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Exploring the legal framework of gas pipelines in Europe

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Abstract

Beginning with the consideration of the Trans Adriatic Pipeline case and the protests surrounding its realisation, this work develops an analysis of the legal framework applicable to the energy infrastructures in the European Union.

The thesis is divided in two main parts which try to give a panoramic overview of the legal regimes: upstream, selecting the Projects of Common Interest (PCIs) at EU level; and downstream, protecting and enforcing the realisation of the selected projects. Both sections reconnect those regimes to the historical and political contexts in which they have developed. The first part focuses on the role of the European Network of Transmission System Operators for Gas (ENTSOG) within the PCIs identification procedure, while the second part on the investor-State dispute settlements under the Energy Charter Treaty. The study points out several procedural and systemic shortcomings which may adverse the pursuit of climate mitigation targets. Moreover, it aims at exploring the system of values that the overall legal structure embodies as well as at understanding which space of action climate activists and social movements possess therein.

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Introduction

The energy sector is a primary emitter of greenhouse gases on global and regional scales[1]. This means that a climate action to be conceived as meaningful and committed has necessarily to cope with the legacies of this sector heavily dependent on fossil fuels. The latest published data on global energy-related CO_2 emissions optimistically detected, after the historical high of 33 gigatonnes (Gt) reached in 2018, a stabilization of the figures, driven by, among other factors, the switching from coal to gas in the "advanced economies".[2]

A key actor on this trend seems to be the European Union, whose headline target of reducing CO_2 emissions of 20% from 1990 levels by 2020 has been already surpassed in 2017[3]. Indeed, the European Union has so far poured 1.6 billion on gas projects,[4] recognised as Projects of Common Interest (PCIs), under the Connecting Europe Facility (CEF) funding programme.

The main recurring themes proposed as justifications of such generous subsidies and loans are the narrative according to which gas is less polluting than coal and oil – thus not countering the climate policy - as well as the need to secure energy supply in EU are.

The narrative of natural gas, as the "bridge fossil fuel" towards energy transition, however, is not very persuasive and for three main reasons.

First, meeting the short-term target of 20% does not necessarily put the EU on track to the carbon neutrality. In fact, the brand new, large-scale gas pipelines could more likely yield to a *carbon lock-in effect*[5].

Second, experts say that, in order to avoid overshooting the Paris Agreement 2 degrees commitment, we can only operate within a limited *carbon budget*. Staying in this spendable budget implies that a third of oil reserves, half of gas reserves and over 80 per cent of current coal reserves[6] must remain underground. Needless to say, in the best-case scenario of an actual energy transition

[1] See greenhouse gas (GHG) data from UNFCCC available on: https://unfccc.int/process-and-meetings/transparency-and-reporting/greenhouse-gas-data/ghg-data-unfccc/ghg-data-from-unfccc

[2] See the article of the International Energy Agency on: https://www.iea.org/articles/global-co2-emissions-in-2019

[3] *Greenhouse gas emission statistics - emission inventories* published by Eurostat, Statistic Explained, 25th June 2019. Available on: https://ec.europa.eu/eurostat/statistics-explained/pdfscache/1180.pdf

[4] See '4th Projects of Common Interest List. Gas: NOT Europe's Common Interest' (Friends of the Earth Europe, Food &Water Europe 2020) available on: https://www.foe.ie/assets/files/pdf/ngo_briefing_4th_pci_list.pdf

[5] See Gregory C. Unruh, 'Understanding Carbon Lock-In' (2000) 28 Energy Policy, pp.817-830; Belén Balanyá and Pascoe Sabido, 'The Great Gas Lock-in. Industry Lobbying behind the EU Push for New Gas Infrastructure' (Corporate Europe Observatory (CEO) 2017).

[6] Christophe McGlade and Paul Ekins, 'The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2 °C' (2015) 517 Nature, pp. 187-190

for the sake of human life on Earth, investments upon these *unburnable* resources would likely become *stranded assets.*[7] Who is going to pay for them? Are their investors going to claim for compensations?

Third, the investments on fossil fuel infrastructures are also exposed to a new risk: climate litigations. On the one hand, those claiming the application or amendment of climate policies and brought against governments; on the other, those seeking redress for losses and damages associated to climate impacts, filed against both governments and private corporations.

These three lines of reasoning could presumably challenge many of the PCIs that have been selected over the last six years by the European Commission.

One of these projects seems paradigmatic in this debate: the Trans Adriatic Pipeline (TAP).

Its construction has been inaugurated in May 2016, one month after the EU had signed the Paris Agreement, and at the time of writing has been completed at 92%.[8] It received in 2018 the largest loan ever granted by the European Investment Bank (EIB).[9]

The TAP is the last part of a giant infrastructural project which will transport gas from the Caspian Sea gas field of Shah Deniz 2 (Azerbaijan) to Europe. It begins at the border between Greece and Turkey, crosses Albany, dives into the Adriatic Sea, before finally landing to the southern cost of Italy, for a total length of 878km[10]. Its upstream section is interconnected to the TANAP (Trans Anatolian Pipeline), which is further linked to SCP (South Caucasus Pipeline); the three pipelines together so constitute the longest (3.500 km) and most expensive (US$40 billion) fossil fuel route to Europe, called the Southern Gas Corridor (SGC).

[7] According to Carbon Tracker, "stranded assets" are *those assets that at some time prior to the end of their economic life (as assumed at the investment decision point), are no longer able to earn an economic return (i.e. meet the company's internal rate of return), as a result of changes associated with the transition to a low-carbon economy (lower than anticipated demand / prices). Or, in simple terms, assets that turn out to be worth less than expected as a result of changes associated with the energy transition.* See on https://carbontracker.org/terms/stranded-assets/

[8] See the project company, TAP AG, website: https://www.tap-ag.com/. Consulted on March 2020.

[9] See European Investment Bank website https://www.eib.org/en/press/all/2019-004-trans-adriatic-pipeline-tap-completes-successful-eur-3-9-billion-project-financing

[10] After crossing the Otranto straight, the pipeline should go underground - inserted into a micro-tunnel by around 800m from San Foca beach - and then it should resurface at 700m by the shoreline. At that point, it would cross other 8,2km towards a receiving terminal, which will occupy around 12-hectare plot of land within the municipality of Melendugno (LE). The Pipeline Receiving Terminal (PRT) would then tap into the Italian grid, operated by Snam, and through it reach out to other European gas networks. The whole detailed project is available on the TAP AG website.

As frequently occurs with such impactful infrastructures, the local population from the territories traversed in Greece,[11] Albany,[12] and Italy,[13] supported by a host of environmental and human rights activists, investigative journalists, experts, and scholars from all around Europe, have engaged in a fierce grassroots resistance.

Especially in the south of Italy, such has been the uproar provoked, for the repetitive interruptions of the building works during the removal of olive trees,[14] and for several judicial procedures undertaken, yet without results, that in October 2018 the Prime Minister Conte sent an open letter to the citizens of Melendugno (LE), where the outbreak of protests had started.[15]

The PM explained that the realisation of the TAP, qualified as a strategic PCI, rests on a trilateral inter-governmental agreement (between Albany, Greece and Italy) which refers to the application of the Energy Charter Treaty (ECT). The ECT is the largest and most-invoked multilateral investment agreement in the international scenario; in broad terms, it basically gives to investors in the energy

[11] In Greece protest rallies stood out in the province of Kavala where a local association of farmers circled in more occasions the bulldozers of JP Avax, operating as TAP AG contractor. In Doxato, a few kilometres away, the major himself has contested the occupation of that area. In the valley of Neos Skopos-Seres, municipality slated to host a pressuring station, the residents have gathered into an Anti-TAP Citizen Committee. The main request coming from these local communities was to reconsider the pipeline route, given several concerns about the safety of the path chosen for edifying and the economic impacts that it could have on the agricultural productions. See the article: "When Athens can't tell a Trojan horse. Rural communities in northern Greece are determined to prevent the EU's most extravagant energy project from scarring their land" by Elena Gerebizza, Re:Common available at http://stories.bankwatch.org/when-athens-cant-tell-a-trojan-horse. From the same author also: "La Grecia e il Tap della Discordia" on https://www.recommon.org/la-grecia-e-il-tap-della-discordia/; "TAP in Grecia, il nuovo reportage" on http://cdca.it/archives/19362.

[12] Many farmers have also lamented the insufficient compensations received by the company for the expropriation of their lands and the irregular and non-transparent procedures followed. BankwatchNetwork, 'Land lost but not forgotten. Impacts of the Trans-Adriatic Pipeline on the land and livelihoods of farmers in Albania', (November 2017), on https://bankwatch.org/wp-content/uploads/2017/11/Land-lost-TAP.pdf

[13] On the other shore of the Adriatic Sea, the first organised grassroot resistance dates back to 2012 with the constitution of the NO TAP Committee, later broadening in 2017 in a social movement. The Movimento NO TAP, since the outsets supported by the local administration, was able to draw nation-wide attention upon this case, releasing several technical studies about numerous uncertainties hanging over the safety, the environmental and economic impact of the engineering project. See on https://www.notap.it/

[14] Along the micro-tunnel perimeter and the additional 8,2 km towards the PRT, 2.231 olive trees (according to the TAP AG declarations on its website: https://www.tap-ag.com/news-and-events/2017/03/27/tap-italy-qandampa-re-olive-tree-removal) had to be uprooted to enable the building. However, on the company website, the number of olive trees to be removed along the way from the PRT (Melendugno) to the Snam gas grid (Mesagne) -55km long- does not appear. This connecting pipeline will be built by the same company owning the Italian gas grid, namely Snam, shareholder of TAP AG. Medias refers to approximately 10.000 of olive trees uprooted and to an upcoming trial against TAP AG on the correctness of its procedures (see Al-Zoubi J, 'TAP 'Confident' as Trial Looms, Prepares to Replant Uprooted Trees',OliveOilTimes,2020 on https://www.oliveoiltimes.com/business/tap-confidant-as-trial-looms/77781). The project company had assured that all the removals were temporary, and the trees would receive in the meantime phytosanitary treatments against the spreading of "Xylella fastidiosa" (the bacterium has been devasting olive trees in Puglia over the last few years). However, this situation has led to many clashes with the locals. The main fears are the effects the transformation of the territory would cost on the oil production and the beauty of this area, which is one of the most famous sea resort destination in Italy.

[15] See on La Gazzetta del Mezzogiorno: https://www.lagazzettadelmezzogiorno.it/news/home/1074023/di-maio-se-tap-non-si-fa-ci-sono-20-miliardi-di-euro-di-penale.html

sector (TAP AG in the case at issue) the faculty of suing host states whether their investments have been disrupted.

The message was clear: Italy *cannot* stop the building works, unless being trapped in long and ruinous litigations over exorbitant compensation claims from the private investors side.

This research work draws inspiration from those words, from such declared "impossibility".

However, my inquiry is not confined to describing the TAP case, yet it just starts from this case law to then examine the two legal frameworks whereby this pipeline was given reality. Upstream, the decision-making process at EU level that grants the PCI status; downstream, the laws that shield the construction and make any public interference "impossible."

The climate activists and authors which have spent themselves in the TAP cause are countless, and to them I mainly own the elaboration of this piece of work. During the years, their voice has not been heard. Hence, the TAP by the end of this year would likely be completed and would start functioning.

Whether the TAP may be deemed a closed case given its near completion, the protests against the building of new fossil fuel routes are definitely a very topical issue.

Last October 2019, the European Commission has released the 4th PCI list, which contains something like 32 gas infrastructures. In February 2020, the EU Parliament has endorsed the list by voting against the motion of resolution tabled by the Greens.[16]

However, according to the commitment expressed in the European Green Deal (December 2019)[17] of reviewing *the regulatory framework for energy infrastructure, including the TEN-E Regulation* (…) *to ensure consistency with the climate neutrality objective,* the European Commission has just opened the consultation procedure.[18]

Moreover, in February 2020, the European Ombudsman has launched an inquiry against the Commission *into the alleged failure to carry out a sustainability/climate assessment for all existing fossil fuel projects on the list of Projects of Common Interest.*[19]

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[16] Motion for a Resolution pursuant to Rule 111(3) of the Rules of Procedure on the Commission delegated regulation of 31 October 2019 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest (C(2019)07772 - 2019/2907(DEA)) https://www.europarl.europa.eu/doceo/document/B-9-2020-0091_EN.html

[17] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, 11 December 2019, COM (2019)640 on p. 6

[18] Feedback period: 18 May 2020 - 13 July 2020. See on https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12382-Revision-of-the-guidelines-for-trans-European-Energy-infrastructure/public-consultation.

[19] Case 1991/2019/KR, complaint received from "Food & Water Europe" against the European Commission, inquiry launched on February 10th 2020 See https://www.ombudsman.europa.eu/it/opening-summary/en/124381.

Finally, even the ECT is currently under a process of "modernisation",[20] prompted, among other things, by the big public and academic debate about the impacts of this treaty on climate mitigation actions.

Assuming the consolidated position according to which climate actions are human rights-related responsibilities upon States, the rationale herein is to investigate which kind of space is in fact left to human rights protection in the European and international legal framework regulating energy infrastructures.

With this purpose, the thesis is developed on the three lines mentioned above, looking into the potential scenarios of: a carbon lock-in; investor-State disputes over fossil fuel assets; and climate litigations. It is split in two main parts:

The I part browses the European legislation that approves the building of trans-European gas pipelines in the first place, and by that, intends to disclose the looming trap of a carbon look-in.

The II part outlines the general framework of the Energy Charter Treaty in the context of the historical evolution of international investment law standards. It especially focuses on the investor-States dispute settlement regime, and briefly introduces climate litigations, as the component that might interfere in the near future in this debate.

The concluding remarks try to take stock of the considerations drawn from both scenarios.

[20] See on https://www.energycharter.org/who-we-are/subsidiary-bodies/modernisation-group/

Part 1

European Energy Policy and PCIs

1. Preliminary Remarks on the Legislative Outlook of the TAP

The object of this first part of the thesis is mainly narrowed on the European energy law. I will try to reconstruct the legal framework surrounding the decision to build the Trans Adriatic Pipeline, and to highlight the shortcomings that have been pointed out by social movements and NGOs, engaged in protests against its construction.

This legal domain is generally treated, among scholars and practitioners, as a sort of sub-discipline in the EU law. This insulation mainly stems from the strategic role that the energy sector plays in the economic and political scenarios. It is subject to the pressures of the international market and of the geopolitics; it is dependent on the technological advancement; and, last but not least, it must deal with the great challenge of the climate emergency. My intent would be to prioritise, in the development of the study, this last concern. Therefore, I will not dwell on all the ambiguities behind the scenes of the project, disclosed by the investigative journalism.[21] Yet, my focus will exclusively be on the legal framework applicable to gas energy infrastructures in Europe, and on its significance for climate action policies. Accordingly, a special attention will be paid to two regulations: Reg. (EC) 715/2009 on the conditions for access to natural gas transmission network, which is part of the Third Energy Package;[22] and Reg. (EU) 347/2013 on guidelines for trans-European energy infrastructure, generally recalled as the TEN-E regulation. These two regulations provided the underpinning norms to trans-European gas infrastructures: the former

[21] Paolo Biondani and Leo Sisti, 'Tap, Gli Affari Sporchi Degli Uomini Del Gasdotto' [2017] L'Espresso available on:https://espresso.repubblica.it/inchieste/2017/03/31/news/tap-ecco-gli-affari-sporchi-degli-uomini-dietro-il-gasdotto-in-puglia-1.298603; Paolo Mondani, 'Caviar Democracy' [2016] Report, the episode is available on https://www.rai.it/programmi/report/inchieste/Caviar-democracy-6a77698f-f024-48b9-85d0-eeb9e7e7283b.html.

[22] The Third Energy Package includes: Regulation (EC) No 713/ 2009 establishing an Agency for the Cooperation of Energy Regulators; Regulation (EC) No 714/ 2009 on conditions for access to the network for cross- border exchanges in electricity, repealing Regulation (EC) No 1228/ 2003; Regulation (EC) No 715/ 2009 on conditions for access to the natural- gas transmission networks, repealing Regulation (EC) No 1775/ 2005; Directive 2009/ 72/ EC concerning common rules for the internal market in electricity and repealing Directive 2003/ 54/ EC; Directive 2009/73/EC concerning common rules for the internal market in natural gas and repealing Directive 2003/ 55/ EC. In 2018, the Third Package has been slightly amended by the Clean energy for all Europeans package.

instituted the European Network of Transmission System Operators for Gas (ENTSOG) and tasked this entity with the drafting of the Ten Year Network Development Plan (TYNDP) for gas; the latter developed the framework of projects of common interest (PCI).

The EU energy law has a vast, intertwined, and multilevel dimension in a constant state of flux. This whole complexity is beyond the scope of the present research. However, I am aware that the legal points I am going to stress may touch the rationale informing the entire policy on energy infrastructure. Hence, some broader considerations might be in order, so as to justify my considerations.

2. The Path towards the Energy Market Liberalisation. The Third Energy Package

To begin with the Reg. (EC) 715/2009, I will briefly portray the background wherein the Third Energy Package has been issued. This package of regulations and directives is indeed to be considered in line with the previous First Package, released in 1996-1998,[23] and Second Package, published in 2003.[24]

Compared to other markets, the internal energy market has developed much later, mainly because it has first jealously evolved within the national borders. However, looking back at its history, the regulation of the energy sector laid the foundation of the very process of integration. Robert Schuman and Jean Monnet, among other European politicians, planned to establish an economic collaboration among the European countries over the production of coal and steel. This economic partnership, in their view, was intended to create a first political synergy and to prevent new military conflicts in Europe. The coal was, indeed, the primary raw material employed to produce energy at that time, while the steel was significant resource to make machineries of war. This line of reasoning was the ground for the Paris Treaty in 1951, founding the European Coal and Steel Community (ECSC), and few years later, in 1957, to both the Treaty of Rome, establishing the European Economic Community (EEC), and the Euratom Treaty, instituting the European Atomic Energy Community. Two of the three founding Treaties deal with energy regulation.

[23] The First Energy Package includes: Directive 98/ 30/ EC concerning common rules for the internal market in natural gas; and Directive 96/ 92/ EC on common rules for the internal market in electricity.

[24] The Second Energy Package includes: Directive 2003/ 55/ EC on common rules for the internal market in natural gas and repealing Directive 98/ 30/ EC; Directive 2003/ 54/ EC concerning common rules for the internal market in electricity and repealing Directive 96/ 92/ EC; and Regulation (EC) No 1228/2003 on conditions for access to the network for cross- border exchanges in electricity.

Despite the EEC free movement of goods since the outset has been said[25] applicable to the energy sector; although the economic integration has deepened in scope and regulation over the years; and although the internal market rules on energy have been extended beyond the European borders, by virtue of the European Energy Community,[26] the energy sector has remained a contentious domain running at a different pace.

Recognised as a strategic element in the economic and political national landscape, the energy sector and its regulation have evolved *closely bound up with national sovereignty*.[27] Member States did not want to surrender "energy sovereignty" to the Commission, so that for a long time the scenario has been dominated by state owned monopolies that were vertically integrated[28] and regulated by national public-administrative laws.[29]

The first momentum towards the liberalisation of the energy market dates back to the late 80s. The international geopolitics, giving thrust to a market-oriented ideology, and the privatisation experience initiated by the US and UK gave confidence to European leaders that opening energy national markets to competition would have upgraded this economic sector.[30] From the outset, the liberalisation of the market and the "Europeanisation" of the energy policy were said[31] to be driven by three pillars: sustainability, security of supply, and competitiveness.

In that context, the integrated functioning and adjustment of the energy infrastructures became key. The regulation of these *essential facilities*[32] - as they are used by all consumers in and

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[25] Kim Talus, *Introduction to EU Energy Law* (Oxford University Press, 2016). p.2 refers to the CJEU judgment in Costa v ENEL (1964) Case 6/64

[26] Treaty establishing the Energy Community, L 198, 20/07/2006, p. 18

[27] Talus, *Introduction to EU Energy Law* (n 25). p.2

[28] From the Oxford Dictionary of Economics, Oxford University Press "vertical integration" is *the combination in one firm of two or more stages of production usually operated by separate firms. Vertical integration may be beneficial for firms if it assists in coordination over the quality and reliability of intermediate goods which one independent firm would have sold to the other. On the other hand, it may inhibit entry to and competition in an industry.*

[29] Kim Talus, *EU Energy Law and Policy: A Critical Account* (Oxford University Press 2013) chapter 2; Talus (n 25) introductory chapter.

[30] In Talus, *EU Energy Law and Policy: A Critical Account* (n 29) p. 18 the author also refers this transformation to the legitimacy crisis that those energy monopolies were facing, including the corruption scandals involving companies in Italy, France, and Germany.

[31] See the statement of the former EU Commissioner for Energy, Günther Oettinger, Foreword, *EU Energy Law. The Energy Infrastructure of the European Union*, vol VIII (Claeys & Casteels 2014); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Progress towards completing the Internal Energy Market, Brussels, 13.10.2014 COM(2014) 634 final.

[32] According to the Glossary of terms used in EU competition policy. Antitrust and control of concentrations issued by the Directorate-General for Competition, EU Commission, June 2002, an essential facility is "*a facility or infrastructure which is necessary for reaching customers and/or enabling competitors to carry on their business. A facility is essential if its duplication is impossible or extremely difficult due to physical, geographical, legal or economic constraints.*"

participants to the energy market and difficult or impossible to be duplicated - appeared to the European legislator as the only way to truly realise the *free movements* in the energy sector.

Whereas the First Package in the 90s laid the first foundations by terminating monopoly rights and opening generation and supply activities to competition, the Second Package in 2003 addressed, to some extent, the transmission infrastructure regulation.[33] The latter introduced the principle of transparent and non-discriminated third party access (TPA) into transmission networks of gas and electricity, and it prescribed that grids have to operate through separate legal entities (legal unbundling of transmission system operators), where vertically integrated undertakings exist (which represented the most common arrangement in energy supply chains).

Yet, the EU Commission in the Sector Inquiry released in 2007 stressed, among other regulatory flaws to be addressed, *the insufficient unbundling of networks from the competitive parts of the sector*,[34] namely generation and supply activities. This was pointed at as a *structural conflict of interests* and the cause of various abuses, such as *capacity hoarding, delays and inequalities in access provision, cross-subsidies and margin squeeze.*[35] These aspects were the core shortcomings urging the Commission to table the Third Package. Accordingly, the Third Package mainly focussed on addressing an "effective unbundling". It provided for three models of unbundling, each one with a different combination of structural and regulatory solutions.[36] This set of norms have considerably restructured the corporate organizations, as a consequence of the entry of several financial investors in the TSOs profiles, and they have rearranged the overall regulatory framework.

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[33] In Directive 2003/54/EC, preamble para. 8, and in Directive 2003/55/EC, preamble para. 10, among several references throughout the texts implementing this objective, it can be read "*In order to ensure efficient and non-discriminatory network access it is appropriate that the transmission and distribution systems are operated through legally separate entities where vertically integrated undertakings exist"*

[34] Communication from the Commission - Inquiry pursuant to Article 17 of Regulation (EC) No 1/2003 into the European gas and electricity sectors (Final Report) {SEC(2006) 1724}, COM/2006/0851 final, Brussels, 10.1.2007

[35] Inge Bernaerts, 'The Third Internal Market Package and Its Implications for Electricity and Gas Infrastructure in the EU and Beyond', *EU Energy Law. The Energy Infrastructure of the European Union.*, vol VIII (Claeys & Casteels 2014),p.7.

[36] ibid. p.10 The three models are: the ownership unbundling (OU); the independent system operator (ISO); and the independent transmission operator (ITO). Whereas the first provides for the full unbundling of the ownership of the transmission system from the production and supply interests; the second admits that undertakings with production and supply interests continue to own transmission systems, at the condition that an independent entity is appointed to carry out the operator's activities; the third admits that the undertakings with production and supply interests continue to both own and operate the transmission systems, yet obeying a strict set of rules to assure the independence of the operator activities' management. However, the normative provides for an exemption condition. The TAP is one of the project has been exempted; see Commission Decision, on the exemption of the Trans Adriatic Pipeline from the requirements on third party access, tariff regulation and ownership unbundling laid down in Articles 9, 32, 41(6), 41(8) and 41(10) of Directive 2009/73/EC, C(2013) 2949 final, 16.5.2013 . According to Bernaerts (n 35) p. 29 *the rational of the exemption possibility is that some investments may be so significant and risky that they would not take place under the regulated regime, as the investors would be too uncertain about their pay back*.

Going through the details of the third package might be dispersive and off topic; what it is important to stress herein, instead, is the underlying motive that has encouraged the legislator to pursue a further normative.

The declared aim was that of integrating a European market for energy, based on the principles of competitiveness, security of supply, and sustainability. Sustainability has been concerned with the goal of decarbonising the energy mix and reaching the "20-20-20 objective" (cutting by 20% the GHGs emissions, compared to the 1990 levels; increasing by 20% the energy efficiency; and reaching 20% of renewables in the European energy mix consumption[37]), while security of a continuous supply at a competitive price has been regarded as a public good, given its significance to businesses and households. These three objectives sought to advance and to consolidate a European dimension in the energy market.[38]

In few words, the new tools and entities that are the main objects of this study are to read within this whole context. I am referring to the European Network of Transmission System Operators for Gas (ENTSOG),[39] the Ten Year Network Development Plan (TYNDP) for gas,[40] mentioned in the introduction, and to the Agency for the Cooperation of Energy Regulators (ACER);[41] they have been all established by the Third Energy Package.

The ENTSOG was meant to gather all certified[42] national TSOs into a single legal entity, *in order to promote the completion and functioning of the internal market in natural gas and cross-border trade and to ensure the optimal management, coordinated operation and sound technical evolution of the natural gas transmission network*.[43]

Among its tasks, that of adopting *a non-binding Community-wide ten-year network development plan (Community-wide network development plan), including a European supply adequacy outlook, every two year.*[44] The TYNDP for gas basically contains forecasts of the gas demand in Europe for the coming two years and the projections of the infrastructures that are necessary to meet those demands adequately.

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[37] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources (OJ L 140, 5.6.2009, p. 16).
[38] Oettinger (n 31).
[39] Regulation (EC) No 715/2009 Art 5
[40] Ibid. art.8
[41] The Regulation (EC) No 713/2009
[42] Regulation (EC) No 715/2009 Art. 3 provides for the process of national certification.
[43] Ibid. Art.4
[44] Ibid. Art.8. The ENTSO-G website states "*The Ten-Year Network Development Plan (TYNDP) provides an overview of the European gas infrastructure and its future developments, and it maps the integrated gas network according to a range of development scenarios. The TYNDP also includes a European supply adequacy outlook and an assessment of the network resiliency."* See the plans enacted so far available on: https://www.entsog.eu/tyndp#:~:text=The%20Ten%2DYear%20Network%20Development,assessment%20of%20the%20network%20resiliency.

Next to the ENTSOG, the Third Package has instituted the ENTSO-E,[45] an entity with analogous and complementary functions, but for electricity. The two ENTSOs work together in the PCI identification process examined below, as being their TYNDPs for gas and electricity the starting point in the selection procedure. The ENTSOE, however, will remain out of the study scope.

Finally, the ACER gathers in itself all the national regulatory authorities (NRAs). It completes and coordinates the NRAs actions, and it also reviews the activities performed by the ENTSOs, such as precisely that of setting the TYNDPs.

3. The PCI Status in Reg. (EU) 347/2013

The other relevant normative herein is the Reg. (EU) 347/2013 on guidelines for trans-European energy infrastructure (TEN-E). The TEN-E programme dates back to 1996, when the first EC guidelines comprising a list of projects of European interest was adopted. Subsequently, it has been revised other four times (in 1997, 1999, 2003 and 2006) before the release of the regulation at issue. The changes taking place on the planning, coordination, and investment in the energy infrastructures, and the Europe 2020 strategy[46] and Energy Roadmap 2050,[47] that moved the ambition to reduce GHGs emission way further, asked for a modernisation of the TEN-E framework. Thus, the Commission drafted the new provision in line with the purpose of adjusting the normative to the renovated context and of solving the major problem of lagging investments in cross-border projects of transmission.[48]

In this way, the Reg. (EU) 347/2013 identified twelve priority corridors and geographic areas[49] where to intervene. On the one hand, it streamlines the selection process of project of common interest (PCI) at the EU level to implement the development and interoperability of those corridors and areas. On the other, it facilitates the effective realisation of those projects, within the Member

[45] Regulation (EC) No 714/ 2009 Art.5
[46] Communication from the Commission, Europe 2020, A strategy for smart, sustainable and inclusive growth, Brussels, COM (2010) 2020
[47] Communication from the Commission to the European Parliament, the Council, the Europe Economic and Social Committee and the Committee of the Regions, Energy Roadmap 2050, COM/2011/0885 final.
[48] Luc van Nuffel and others, 'Evaluation of the TEN-E Regulation and Assessing the Impacts of Alternative Policy Scenarios' (Trinomics 2018), regarding the shortcomings of the 2006 normative, the report refers to the Commission Staff Working Document Impact Assessment, Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Energy infrastructure priorities for 2020 and beyond - A Blueprint for an integrated European energy network {COM(2010) 677 final} {SEC(2010) 1396 final}
[49] Reg. (EU) 347/2013, Annex I

States territories, by grating them a sort of "priority" status and by providing for their project promoters a host of benefits.

Once being identified as PCI at the Union level, the projects go through a special permit granting[50] within the Member States involved in the building works. This procedure is both very simplified and accelerated, compared to the previous standards. The regulation adopts a "one-shop-stop *to reduce complexity, increase efficiency and transparency and help enhance cooperation among Member States*". [51] In few words, MSs are required to designate one national competent authority in order to integrate and coordinate all permit granting processes. The competent authority may delegate its responsibility to others, but at the condition that *any one such authority acts as the sole point of contact.*[52] Then, the overall process must be finalised within the time-limit of 3 years and 6 months, with the possibility to extent it of other 9 months.[53] Art.10(6), however, stresses that the time-limit must not prejudice the *obligations arising from international and Union law* and *administrative appeal procedures and judicial remedies before a court or tribunal.*

A central part of the permit process deals with environmental assessments. The regulation requires MSs, under the guidance of the Commission, to "streamline" their procedures,[54] namely to speed them up by reducing unnecessary bureaucracy, while maintaining the guarantee level provided for by the applicable EU law[55] and international law. As regards the EU law, the key instrument herein is the directive 2011/92/EU on environmental impact assessment (EIA), besides other sectoral directives, depending on the specific circumstances. Instead, in relation to international treaties ratified by the EU and MSs, the regulation refers in many occasion to the Espoo[56] and Aarhus[57] Conventions. Moreover, several references to the EU climate policy targets are spread throughout the text, in accordance with the objective of "sustainability" that the regulation declared to be based on.

Also noteworthy, is that both the Espoo and Aarhus treaties are informed on the principle of public participation in the decision-making process, on the right to have access to information and

[50] Ibid. chapter III; Annex II
[51] Ibid. preamble para.29; art.8
[52] European Commission, 'Streamlining Environmental Assessment Procedures for Energy Infrastructure "Projects of Common Interest" (PCIs)' (2013), p. 6. There are three possible schemes to implement the one-stop-shop approach that are described therein.
[53] Reg. (EU) 347/2013 Art.10 in which describes the permit granting process as split into two main phases (the pre-application and the statutory permit granting procedures).
[54] Ibid. 7(5)
[55] The key EU normative on environmental impact assessment (EIA) is the Directive 2011/92/EU. Depending on the specific circumstances, other sectoral directives are also applicable, see European Commission (n 52).
[56] Convention on Environmental Impact Assessment in a Transboundary Context, 1989 UNTS 309, 30 ILM 800 (1991).
[57] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447, 38 ILM 517 (1999).

to justice. Public participation and transparency are also directly addressed by the TEN-E regulation without prejudice to those conventions.[58] Member States or, on their behalf, the competent authorities shall publish a manual of procedures for the permit granting procedure in line with these principles, as laid down in art.9 and Annex VI of the provision. Project promoters, on their side, at the very beginning of the permit granting process must develop and submit a concept for public participation to the approval of the national competent authorities, following the rules set out in MSs manual. The minimal requirement is to carry out a public consultation on the project at issue, whose results are to make public. Plus, *the project promoter, or, where national law so provides, the competent authority, shall establish and regularly update a website with relevant information about the project of common interest.*[59]

Coming to the renovated financial aspects, the regulation has considerably strengthened the EU funding assistance that the PCIs may access to.[60] Whereas in the previous programmes the budgets were relatively low, since they mostly relied on the participation of private investors, in the new regulation the PCIs may obtain special incentives through the Connecting Europe Facility (CEF) funding mechanism.[61] The CEF was first designed within the EC's growth package for integrated European infrastructures.[62] Adjusted to the TEN-E regulation objectives, the CEF has then set a certain amount of money to invest in cross-border projects in energy, transport, and telecommunication, for the period between 2014 and 2020.[63] Its objective is that of fostering the sustainable development of those infrastructures, and that of leveraging investments from privates and public sector. Besides this funding programme, the PCIs developers can also apply for generous loans to the European Regional Development Fund (ERDF), and to the European Investment Bank (EIB).

4. Energy Infrastructures and Climate Target. The PCI Selection Process at the EU Level

[58] Reg. (EU) 347/2013 art.9; Annex VI.
[59] Ibid. art.9(7)
[60] Ibid. Art.14, art.15
[61] Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility. Title XVI of the TFEU establishes the Union's role of assisting the development of trans-European networks, and according to it, several funding programmes have been set out for energy, transport, and telecommunication before Regulation (EU) No 1316/2013 entered into force.
[62] Communication from the Commission to the European Parliament, the Council, the European Court of Justice, the Court of Auditors, the European Investment Bank, the European Economic and Social Committee and to the Committee of the Regions, A growth package for integrated European infrastructures, COM(2011) 676 final
[63] Regulation (EU) No 1316/2013 has been amended, subsequently, by Regulation (EU) 2017/2396 in the context of the extension of the European Fund for Strategic Investments (EFSI), and by Regulation (EU, Euratom) 2018/1046.

The accelerated and simplified permit granting and the large availability of financial assistance perfectly reveal that status of "priority" above referred to. At the same time, the attention to environment, transparency, and public participation expresses the efforts made by the European legislator in the drafting to integrating this regulation with other significant points.

Art.11 of the TFEU is the key basis providing for the integration of the environmental protection within EU policies, whereas art.11 of the TEU obliges the Commission to consult with stakeholders in any of its activity, such as that of adopting the PCI list. Environment and stakeholder's participation are two very intertwined aspects, especially when it comes to the building of large-scale energy infrastructures, and even more so when those projects are pipelines transporting fossil fuels. The higher the environmental stake, the larger the number of people involved as stakeholders.

The TEN-E regulation has an important bearing on climate warming. It basically directs the development of the energy infrastructures and so the choice among different energy sources, in the European territory and beyond.

Designing instruments such as the PCIs list, which coordinates and streamlines efforts, may be essential to pursue a common and full energy transition. National and cross-border energy networks need an advancement in order to integrate renewable sources, to optimise energy consumption, and to offer secure, affordable, and environmentally sustainable supply of energy. At the same time, the misguided use of such instrument may, on the contrary, bring to devastating effects.

The main objectives that the TEN-E regulation repeatedly stresses – market integration, security of supply, competitiveness, and sustainability – can frequently conflict with each other. This is what typically happens when gas infrastructures are under evaluation. This is what happened with the TAP.

The project has been mainly justified by the necessity to secure and, precisely, to diversify the energy supply so as to *reduce the risk of over-reliance on a single energy source.*[64] And yet, the average lifetime of a pipeline is between 40 and 50 years,[65] thus colliding with the climate targets.[66]

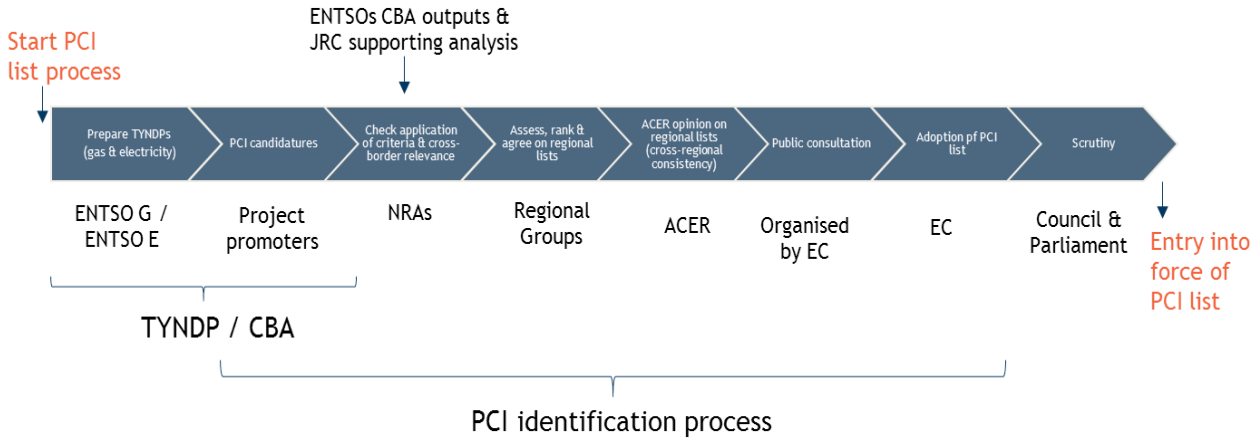
In the introduction, I pointed out that this study was not meant to fully canvass the sole TAP case, but rather to explore the EU normative endorsing the project, as well as the international framework enforcing it. The TAP has been thought as a paradigmatic departure point to frame a

[64] From TAP website page https://www.tap-ag.com/the-pipeline/the-big-picture.
[65] Luc van Nuffel, 'The Role of Trans-European Gas Infrastructure in the Light of the 2050 Decarbonisation Targets' (Trinomics 2018), p. viii. Available on: https://ec.europa.eu/energy/sites/ener/files/documents/gas_infrastructure_2050_report_tasks_3_and_4_v2.pdf
[66] One of the arguments commonly put forward in reply to this objection is that gas pipelines might be adapting in the future to transport "renewable" gases. I will refute this argument and briefly refer to the "renewable" gas category further in this chapter.

bigger picture. As a device to open some broader questions on the laws that have been applied to the TAP as well as to several other fossil fuel routes crossing Europe.

Hence, the following part portrays what have been denounced by hundreds of climate activist organisations as the main distortions within the EU legislation on energy infrastructures, likely to hijack the path towards a just energy transition.

After having gone through the advantages that the PCI status is accorded, we should go back upstream to the PCI selection process at the EU level. The scheme below will guide us into a brief review of the main stages and actors involved in the procedure.[67]



The starting point for the identification of PCIs are the European-wide TYNDPs,[68] drafted by the ENTSOs. Not all the projects included within the TYNDPs are eligible to the PCI status, but only those meeting certain criteria.[69] Before submitting the candidature, the project promoter (*TSO, distribution system operator or other operator or investor*),[70] which is frequently already represented within the ENTSOs, has first to consider whether its project has a cross-border relevance, in a direct or indirect way (by crossing the border of at least two countries or by impacting on the cross-border energy flow). Second, the project must contribute to at least one of the policy objectives, namely *security of supply, competition, sustainability.*

The identification of the projects takes place within the Regional Groups; these are twelve, one per each of the priority corridors and areas.[71]

[67] Luc van Nuffel and others (n 65) p. 21. The "JRC", not mentioned throughout the body text, stays for European Commission Directorate-General Joint Research Centre; it provides independent scientific advice and support to the Commission to draft policies.
[68] Reg. (EU) 347/2013 preamble para.21 reads *"for electricity and gas, in order to be eligible for inclusion in the second and subsequent Union lists, projects should be part of the latest available 10-year network development plan."*
[69] Ibid. Art.4
[70] Ibid. Art. 2
[71] Ibid. Art.3; Annex III

The Regional groups bring together: TSOs, other project promoters and their European associations (ENTSOs); NRAs; the ACER; and finally, the EU Member States and the Commission, both formally entitled with decision-making powers.

The role of the ACER is that of assessing the projects' compliance with the PCI criteria and, as NRAs' coordinator, also that of ensuring the *cross-regional consistency*[72] of the projects in the *application of the criteria and the cost-benefit analysis* (CBA).[73]

The CBA acts as a strong filter in the entire process since it screens from the very outset the drafting of the TYNDPs. Given its significance, art.11 requires this methodology to pass the approval of the Member States, the ACER, and the Commission, before becoming operative.

However, the provision ultimately appoints the same ENTSO[74] to draft the methodology that is employed to assess its TYNDP. A sort of circularity stands out herein, in spite of the wide endorsement that the regulation sets forth.

Finally, before adopting the list, the Commission opens a public consultation.[75] The delegated act[76] enters into force whether no objections are expressed by the Council or the Parliament, within a period of two months from the notification of the act to the two institutions.[77]

5. Procedural Problems

The accusations of ambiguity that have been raised against the identification process come from both non-governmental and institutional organizations, and they touch both procedural and systemic issues. The following part selects just few of the warnings that have been brought up over the years; those that appear more suitable to the study topic.

Starting from the procedural shortcomings, an audit from the European Court of Auditors (ECA), published in 2015, upon the EU spending on energy infrastructures have drawn attention on some

[72] Ibid. Art.3.5 (b)
[73] Ibid. Annex III.2(12)
[74] Ibid. Art.11; Annex V
[75] Mentioning exclusively the questionnaires attaining to the TAP: Report consultation on the 2nd PCI list, 2015 (652 participants) https://ec.europa.eu/energy/sites/ener/files/documents/Report%20final_18_11_2015.pdf; Report on the 3rd PCI list, 2017 (342 participants) https://ec.europa.eu/energy/sites/ener/files/documents/final_report_0.pdf; the consultations on the 1st PCI are not available instead, see on: https://ec.europa.eu/energy/consultations/first-consultation-potential-projects-common-interest_en (consultation period indicated on the website: 23 May 2012 to 7 June 2012); and https://ec.europa.eu/energy/consultations/second-consultation-potential-projects-common-interest_en (consultation period indicated on the website: 20 June 2012 to 4 October 2012).
[76] Ibid. Art. 3(4) pursuant to art.290 of the TFEU
[77] Ibid. Art. 16(5)

limitations concerning the PCI and TYNDP, as planning tools.[78] To be clear, the ECA, investigating on whether the internal market policies and the financial programmes had in fact provided security of energy supply, underlined the lack of a comprehensive model for the assessment of EU level infrastructure needs. Such instrument would indeed be *capable of describing predictions (…) under various policy and market scenarios, including a robust range of demand scenarios.*[79] According to the ECA, this lack has the potential to divert public funds to projects that are unnecessary to meet anticipated energy demand or that have limited capacity to provide security of energy supply.[80] Needless to say, the Commission has only available *specific* infrastructure planning tools to orient public investments; the PCIs lists and the TYNDPs, on which the PCIs lists are based on. Yet, the TYNDPs are not founded on an overall picture of the *EU-policy and market development needs.* Second, the NRAs *do not play a strong role in the evaluation of proposals to the TYNDP.* Third, *they are not always coherent with the national energy infrastructural investment plans.* Plus*, the Member States' notifications to the Commission about existing and planned electricity transmission capacity are often not in line with the TYNDPs.*[81]This last is a further discrepancy preventing the Commission to adequately assess the gaps existing between the energy infrastructure in use and their real potential to address the energy demand.

Hence, the recommendation of outcome to the Commission, among others, was that to implement a modelling tool being at once *comprehensive* of all policy and market objectives, and *in-house,* instead of deferring to external contractor – as the Commission does - or to the ENTSOs modelling – as the ACER does. This tool would function as *a reference to other strategic documents such as TYNDPs,*[82] and so it would assure the Commission's interventions on energy infrastructures not being misguided and unnecessary.

Besides the admonition on the funding side, a very recent analysis[83] on the last issued 4th PCIs[84] list actually found an inconsistency between the 32 new gas infrastructures[85] contained therein and

[78] European Court of Auditors, 'Improving the Security of Energy Supply by Developing the Internal Energy Market: More Efforts Needed' (2015) 16, p. 43 para.83

[79] Ibid. In para.84 the ECA refers to an unnecessary LNG terminal project for the Baltic region on the agenda in 2015. The project was inserted in the PCI list, although the Klaipeda LNG terminal in that area was fully *sufficient to cover falling gas demand*.

[80] Ibid.

[81] Ibid. p.44 para. 86

[82] Ibid. p. 9 Recommendation 7.

[83] 'An Updated Analysis on Gas Supply Security in the EU Energy Transition' (Artelys 2020). Available on: https://www.artelys.com/wp-content/uploads/2020/01/Artelys-GasSecurityOfSupply-UpdatedAnalysis.pdf

[84] ANNEX to COMMISSION DELEGATED REGULATION (EU) …/... amending Regulation (EU) No 347/2013 of the European Parliament and of the Council as regards the Union list of projects of common interest {SWD(2019) 395 final}, Brussels, 31.10.2019 C(2019) 7772 final

[85] 23 pipelines, 4 storage facilities, 5 LNG terminals. The report considers also other 5 new natural gas infrastructures projects that are not part of the PCI list (Nord Stream 2, White Stream, Turkey-Bulgaria pipeline, Wilhelmshaven and Brunsbuttel)

the gas demand scenario. Artelys, a data modelling consultancy, developed this study by combining a wide range of gas demand projections with serious gas disruption events potentially occurring in Ukraine, Belarus, and Algeria. It concluded that the existing EU gas infrastructures are sufficient to meet any future demand scenario in the EU28. Furthermore, confirming a previous study conducted in 2016,[86] it suggested the employment of an *integrated gas-electricity approach* to infrastructure planning. Such *integrated approach* stands for considering the flexibility brought by the electricity system so as to fulfil the energy demand. The cost-benefit analysis purported by the ENTSOG is claimed, instead, to only *consider a fixed gas demand that must be supplied in all circumstances, without allowing for flexibility from other sectors.*[87]

The 4th PCIs list published last October by the Commission prompted several other complaints, among which a motion for a resolution, tabled by the Green party.[88] Although it ended with no positive results, some of the calls made to the European Parliament in support of the motion are noteworthy for their broader reflections on the legal framework currently in force.

The environmental law charity ClientEarth[89] built a case on the alleged violation by the Union list of both the TEN-E regulation and the EU treaties and international obligations.

The former allegation rests on the ACER opinion expressed on the draft regional list of proposed gas PCIs.[90] The opinion, which ultimately endorsed the draft list overall, does not relate directly to the 4th PCI list, but to a much larger number of proposed projects.[91] Thus, the objections posed by the agency cannot directly be transposed to the final list. However, ClientEarth argued that since the criticisms expressed on the gas projects were visibly inconsistent with the TEN-E regulation requirements, and since there is no public indication that those shortcomings[92] have been remedied since the opinion was published, it is possible to draw some relevant arguments from this document about the procedure and methodology followed to prepare the list.

First, as regards the CBA methodology, ACER noticed that the monetary value of costs and benefits were not available for all PCIs and, where provided, they were frequently *expressed on a*

[86] Jonathan Gaventa, Manon Dufour and Luca Bergamaschi, 'Energy Union Choices: A Perspective on Infrastructure and Energy Security in the Transition' (E3G 2016). Available on https://www.e3g.org/wp-content/uploads/E3G_More_security_lower_cost_-_Gas_infrastructure_in_Europe.pdf.
[87] 'An Updated Analysis on Gas Supply Security in the EU Energy Transition' (n 83), p. 11.
[88] See https://www.europarl.europa.eu/doceo/document/B-9-2020-0091_EN.html. The vote occurred the 12th February 2020 resulted in: 443 votes against, 169 in favour and 36 abstentions. See the article https://www.euractiv.com/section/climate-environment/news/parliament-backs-eu-list-of-energy-projects-ignoring-greens/
[89] Raphael Soffer and Eleni Diamantopoulou, 'Non-Compliance of the 4th PCI List with EU Law and the Paris Agreement' (ClientEarth 2020). Available on https://www.documents.clientearth.org/wp-content/uploads/library/2019-01-29-clientearth-non-compliance-with-the-4th-pci-list-ce-en.pdf
[90] ACER, 'Opinion No. 19/2019 on Draft Regional Lists of Proposed Gas Projects of Common Interest 2019'.
[91] The opinion considers precisely 56 compared to the 32 resulting in the final 4th PCI list
[92] Raphael Soffer and Eleni Diamantopoulou (n 89). See the table at p.8.

yearly basis and not discounted,[93] thus making *impossible to demonstrate that a given project's benefits exceed its costs.*[94] According to the charity, this conflicts with Art.4(1)(b) of the TEN-E Regulation under which it is required to assess the overall benefits of the project, including those in the long term.

Second, the methodology does not include an *assessment of alternative ways for resolving a specific need (...) rather than building new infrastructure.*[95]

Third*, the TYNDP indicators used by ENTSOG, which were the only ones on which the identification of needs relied (...) may not adequately capture the contribution of the candidate PCIs to sustainability.*[96] Accordingly, ACER states that *not using the sustainability assessment and not suggesting any alternative, is suboptimal (...) the absence of a sound assessment of the projects' contribution to sustainability leads to great uncertainty and doubt about the viability (or even the need) for the projects in the long run.*[97]

Art. 4(2)(b)(iv) of TEN-E Regulation does not require gas projects to fulfil all four objectives of the EU energy policy - market integration, security of supply, competition, and sustainability. Yet, the preliminary assessment provided by ENTSOG *assigned a positive sustainability benefit to each and every candidate project.*[98] In this regard, ACER asserts that ENTSOG's preliminary assessment would be *tenable only under the specific assumptions that gas will be a substitute of more polluting fuels in the European Union's primary energy mix, and also that the total volume of consumed gas will be within a range that ensures that overall greenhouse gas emissions resulting from gas use will stay below the European Union's policy targets.*[99] Both points - the polluting effect of natural gas and the respect of climate policy targets – will be examined below.

[93] ACER (n 90) p.5 et seq.
[94] Ibid. p. 16; see also Raphael Soffer and Eleni Diamantopoulou (n 89) pp. 10-11 it is stressed the systemic nature of those issues, by referring to ACER, 'Consolidated Report on the Progress of Electricity and Gas PCIs' (2019). In that occasion, ACER claimed against the project promoters the same issue of a lack of adequate data available to assist the monitoring phase of the 3rd PCI list ("*the estimated monetised value of benefits was provided only for 6 PCIs (out of 53 gas PCIs), the same number of projects as in the 2018 monitoring exercise. Similarly, project life-cycle cost data are missing or incomplete for 74 investment items (out of 93) which represents 68% of the PCIs;*" "*Since all PCIs are subject to CBA already at the stage of preparing the PCI list, the lack of any estimate of the value of a project's expected life cycle costs and benefits casts fundamental doubts on the projects merits")*
[95] Ibid. p.6 and Raphael Soffer and Eleni Diamantopoulou (n 89) p.9
[96] Ibid.
[97] Ibid. p.8
[98] Ibid.p.7
[99] Ibid. p.7

In view of all these aspects, ClientEarth questioned the approval given by ACER to the draft regional list, claiming that the procedure followed to assess those projects does not satisfy the requirements set forth in the TEN-E regulation.

On the other hand, in relation to the general inconsistency of the final 4th PCI list with the EU climate objectives, the report recalls both the climate emergency resolution published by the EU Parliament in November 2019 and the European Green Deal issued by the EU Commission in December 2019. While the former generally urges the new Commission to *address the inconsistencies of the Union policies on the climate and environment emergency, in particular through a far-reaching reform of its,* among others*, energy and infrastructure investment policies*;[100] the latter precisely calls for a review of the TEN-E Regulation in line with the climate neutrality goal.[101] Both documents seem to validate the inconsistency of reg. (EU) 347/2013 with the climate commitments made by the EU.

6. Systemic Problems

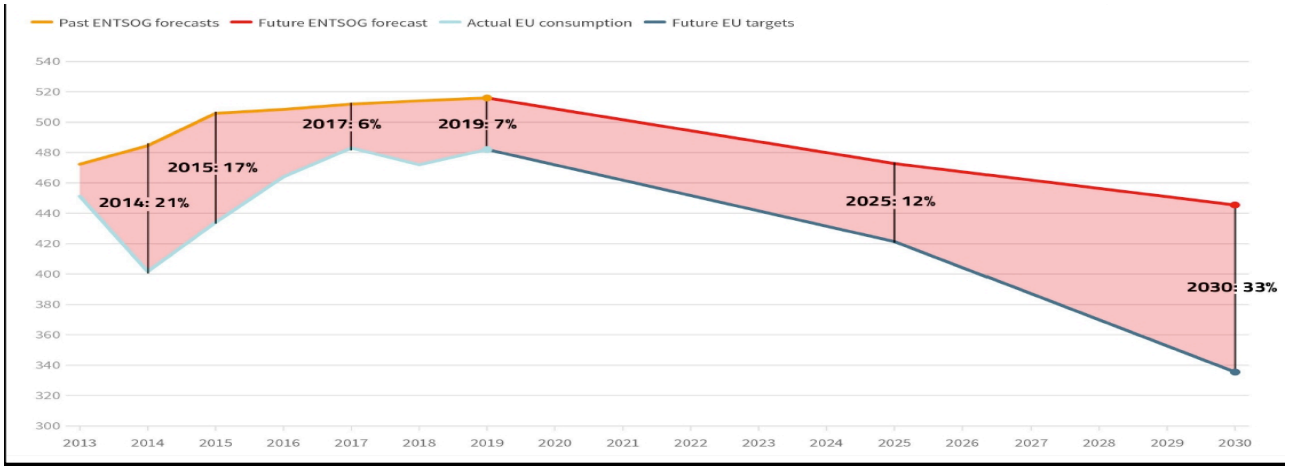
For Friends of the Earth, Corporate Europe Observatory, Food & Water Europe, Greenpeace EU and other nearly 200 organisations, the problem about the TEN-E regulation and the wide endorsement of several fossil fuel projects by the EU is not just "technical". The procedural flaws detected above are just the visible surface of a deeply rooted structural distortion.

Global Witness put together the forecasts of gas demand within the TYNDPs from 2013 until today. The graphic below[102] shows that ENTSOG has regularly overestimated the EU consumption of gas, and that the recently published 2020 TYNDP foresees by 2030 a consume 33% higher than what the EU has expected to consume to meet the climate goals.

[100] European Parliament Resolution of 28 November 2019 on the climate and environment emergency (2019/2930(RSP)) point 4

[101] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The Green New Deal, 11 December 2019, COM(2019) 640, p.6

[102] Global Witness, 'Pipe Down. How Gas Companies Influence EU Policy and Have Pocketed €4 Billion of Taxpayers' Money' (2020). p.6 the sources are reported in notes 38,39,40,41,42.



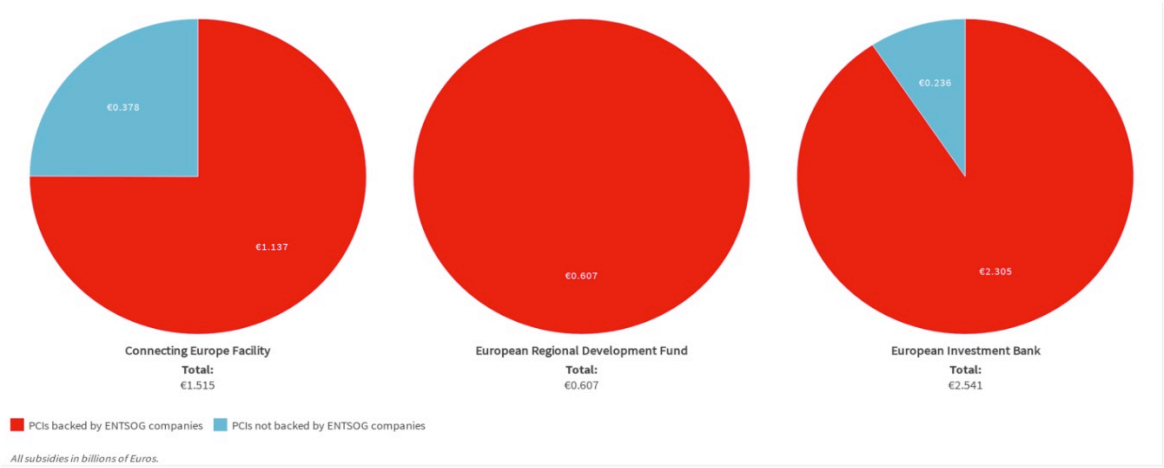
Moreover, it investigated into the amount of public funding being attracted by gas transmission projects so far and its main recipients. About half of the CEF subsidies since 2013 have been channelled to gas projects,[103] 75% of which were backed by ENTSOG's companies. Financial assistance to PCIs has also been provided by the European Regional Development Fund (ERDF), which directs funds to the least developed economies. Since 2013, it has delivered €607 million exclusively to projects backed by the ENTSOG. Finally, another central financial actor on the table is the European Investment Bank (EIB) which have offered no less than €2.540 billion of subsidised loans to gas PCIs, 91% of which to ENTSOG-backed projects. The biggest loan was delivered precisely to realise the TAP.[104] Below, the graph realised by Global Witness.[105]

[103] European Commission, Connecting Europe Facility Energy Supported Actions, May 2019 https://ec.europa.eu/inea/sites/inea/files/cefpub/cef_energy_supporting-actions_2020-web.pdf

[104] Global Witness (n 102) refers to: European Investment Bank, Trans Adriatic Pipeline, available at https://www.eib.org/en/projects/pipelines/all/20140596, last visited 27 April 2020; Trans Atlantic Pipeline, Southern Gas Corridor, available at https://www.tap-ag.com/the-pipeline/the-big-picture/southern-gas-corridor, last visited 27 April 2020; Friends of the Earth Europe, Controversial gas pipeline awarded €1.5bn, 8 February 2018, available at https://www.foeeurope.org/Controversial-gas-pipeline-awarded-1.5bn-060218. Noteworthy, at p. 9 the report states that *in 2019, the EIB announced it would no longer fund fossil fuel projects, but created a special loophole that will allow it to continue awarding loans to PCIs until the end of 2021* (in note it sends to European Investment Bank, EIB energy lending policy, 14 November 2019, p. 15)

[105] Ibid. p.10 and the annexes of the study for details.

Financier	All gas PCI subsidies	ENTSOG-backed PCI subsidies	Percent of total finance awarded to ENTSOG PCIs
Connecting Europe Facility	€ 1,514,468,217	€ 1,136,731,974	75%
European Regional Development Fund	€607,219,921	€607,219,921	100%
European Investment Bank	€2,540,464,116	€2,304,676,849	91%
Total	**€4,662,152,254**	**€4,048,628,744**	**87%**



The focus that the study pays on the recurrent overestimation in the projections of EU gas consumptions as well as on the volume of funding received by ENTSOG's companies underlines two main aspects.

First, although ENTSOG's forecasts are not directly endorsed by the Commission, which collects its data from separate contractors, and although the TYNDPs estimates have to pass a broad approval within the PCI procedure, the ENTSOG has in fact exerted a great influence on the final outcomes. The Commission has over the years approved, besides the controversial TAP, several other gas projects deemed either unnecessary to satisfy the energy supply,[106] or incongruent with the TEN-E regulation's requirements,[107] by a second external review.

Second, the fact that ENTSOG's members are the primary beneficiaries of those public subsidies opens a visible conflict of interests with their central and permeating presence within the PCI identification procedure.

[106] See the references above from ECA and Artelys.
[107] See above on the ClientEarth's report.

The "systemic" problem for those hundreds of NGOs mentioned above rests on such conflict of interests resulting from the very presence of industrial representatives in the decision-making process.[108]

The institution of the ENTSOs within the Third Energy Package (Reg. (EC) No 715/ 2009) is part of the long-standing path initiated by the European legislator for deconstructing national monopolies and integrating a single market in the energy sector. A slow process started in the 90s and drove by the objective to liberalise and privatise an economic sector that until then had been jealously grown within the national borders. Unbundling vertical integrated monopolies and assembling a European dimension among the newly admitted investors were the two guidelines informing the whole legislation in the energy sector. Once separated, and thus assured the independence of generation and supply interests from transmission functions, the national gas transmission system operators (TSOs) across Europe were brought together within the ENTSOG to *facilitate* and *enhance their cooperation.* Such discussion table has been thought to strengthen and to enforce the energy policy objectives of market integration, competition, security of supply, and sustainability.

Yet without passing judgement on the whole historical and political context that laid the foundations for this entity, is the quantum leap of inserting corporate interests at the base of a legislative process reasonable and acceptable?

The legal basis that justifies the ENTSOG's presence as an advisor of the Member States and the Commission - which are the only entities holding decision-making powers – in the PCI selection process should be art.11 of the TEU, obliging European institutions to maintain a dialogue with stakeholders while carrying out their activities. Yet, has the same privileged position been reserved to other stakeholders, such as environmental organizations or local communities and municipalities whose territory is involved in the building works?

As seen, Annex VI and art.9 of the TEN-E regulation have been fully devoted to guarantee public participation and transparency. Despite the inadequacies that have been noticed in the implementation of those norms,[109] even whether public consultations were applied in perfect

[108] See the campaign 'Fossil Free Politics' launched by Corporate Europe Observatory, Food & Water Europe, Friends of the Earth Europe, and Greenpeace EU and adhered by about 200 other organisations (https://www.fossilfreepolitics.org/)

[109] 'Analysis of the Manuals of Procedures for the Permit Granting Process Applicable to Projects of Common Interest Prepared under Art.9 Regulation No 347/2013 Overview Report' (Milieu Ltd 2016), p. 8 the report states *Article 9(3) of the TEN-E Reg. requires project promoters to draw up and submit a concept for public participation to the one-stop-shop. So far, only four Member States (France, Greece, Ireland and the UK) have applied the public participation concept in practice.*

compliance with the provisions, the participation of stakeholders other than TSOs is hardly comparable to the position that the ENTSOG maintains in the whole procedure.

Moreover, its statutory role of formulating forecasts over EU gas consumptions and over the needed infrastructures to meet these projections is to be assessed in the light of its lobbying action.

The ENTSOG is registered in the European Transparency Register within the section "in-house lobbyists and trade/business/professional associations".[110] It is participated by 56 gas distribution companies[111] (44 members, 3 associated partners, 9 observers); some of which are majority owned by prominent international oil and gas companies.[112] Even conceding that TSOs as stakeholders (as promoter, developer, and private investors of those projects) have a valuable expertise and knowledge to contribute with in the planning of infrastructural developments, are oil and gas companies' plans for business development what the EU really needs to achieve a full and just energy transition?

Two main narratives have been usually put forward by TSOs to justify the compliance of new gas pipelines with the sustainability criterion in the energy policy and the European climate targets. The assumptions that on this first stage towards carbon neutrality, natural gas would be a "bridge fuel" to lower-emission economies, and that on a second stage, these pipelines would be used to deliver "decarbonised gases", thus in accordance to the stricter carbon-reduction goals.

Although it is well attested that *burning natural gas for electricity produces about half as much carbon dioxide as burning coal,*[113] the natural gas's role as a bridge fuel in the energy transition is very questionable. It should not be underestimated that methane is a potent greenhouse gas and that in a timeframe of 20 years it is up to 86 times stronger than carbon dioxide.[114] Thus, methane leaks occurring throughout the production and distribution phases are a central issue to consider. Recent studies prove a range of difficulties existing for both monitoring and mitigating methane leakages, so that investing for implementing those technologies would be very expensive and still have uncertain results.[115] As concerns the adjustments to make to the existing pipelines so as to transport "decarbonised" or "renewable" gases in the future, there are few points to make. Firstly, this option floats in the uncertainty about the effective availability of these adaptations for those infrastructures

[110] https://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=565032821273-72
[111] See the ENTSOG website https://www.entsog.eu/ (consulted in June 2020)
[112] Friends of the Earth Europe, 'Hiding in Plain Sight. How the EU's Gas Lobby Is at the Heart of EU Energy Policy Making' (2017), p.2 the report portrayed the international partnerships of some ENTSOG's members in 2017: FGSZ (Hungarian), GRTGaz (French), REN-Gasodutos,S.A. (Portuguese), Enagàs (Spanish), Gasunie (Dutch).
[113] See Chandler DL, 'The uncertain role of natural gas in the transition to clean energy', (MIT News Office 2019). Available on http://news.mit.edu/2019/role-natural-gas-transition-electricity-1216.
[114] Ibid.
[115] Ibid. and see Oil Change International, Burning the Gas 'Bridge Fuel' Myth: Why Gas Is Not Clean, Cheap, or Necessary, May 2019 available on http://priceofoil.org/2019/05/30/gas-is-not-a-bridge-fuel/

designed to transport only natural gas. Secondly, another uncertainty regards the availability of financial resources to implement the upgrades needed. Thirdly, the GHG impact of those "decarbonised" gases depends on the conversion technologies employed.[116] Despite the label (which comprises various alternatives), "renewable" gases are not all necessarily fully "green". And finally, comparing different estimates[117] on the future need of gases, the numbers just do not add up. The supply is supposed to be so low as not to justify anyway the building of new gas infrastructures for transporting, besides natural gas, those other gases.

To conclude, all the uncertainties existing on both levels - for developing mechanisms to minimise and to control methane leakages as well as for upgrading gas pipelines - bring into play the principle of precaution (art.191(2) TFEU). A vast literature exists on the development of this pillar of environmental law.[118] Being revoked by different branches of international law,[119] the precaution has not evolved in a homogeneous fashion, but rather its readings reflect the fragmentation existing in the international legal scenario. Commonly, the greater or lesser extent of the principle has depended by the institutions entrusted with its interpretation.[120] An interesting point, that it is not possible to develop here, would be to examine how this principle might be interpreted under EU law and Member States' domestic laws, in relation to the argumentations made above.

7. The Carbon Lock-in. But Something New is on Sight

[116] See Maria Olczak and Andris Piebalgs, What is renewable gas?, Florence school of Regulation, 14th March 2018 on https://fsr.eui.eu/what-is-renewable-gas/; The International Council on Clean Transportation, What is the role for renewable methane in European decarbonization?, October 2018 on https://www.euractiv.com/wp-content/uploads/sites/2/2018/10/Renewable-Methane-Briefing_ICCT.pdf; Corporate Europe, A dangerous distraction: "renewable" gas us on the fossil fuel path. The 7 myths industry uses to sell us so-called renewable gas, November 2018 on https://corporateeurope.org/en/climate-and-energy/2018/11/part-1-dangerous-distraction-seven-myths-industry-uses-sell-renewable-gas

[117] Raphael Soffer and Eleni Diamantopoulou (n 89) pp. 14-15

[118] Regarding its evolution within environmental law see Silvia Manservisi, 'Il Rischio Ambientale e Il Principio Di Precauzione', *Trattato di diritto agrario* (Utet giuridica 2011). Originated in the domestic law – she refers to the German "Vorsorgeprinzip"– the precaution has received universal consecration within Principle 15 of the Rio Declaration on Environment and Development UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992), which reads "*In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*".

[119] Besides being part of several environmental law treaties, the principle of precaution is also part of the trade regime, see GATT (1947) Art. XX

[120] With regards to the WTO regime, see Paolo Picone and Aldo Ligustro, *Diritto Dell'Organizzazione Mondiale Del Commercio* (Cedam, 2002), p. 212. The authors argue the principle of precaution here is subject to an "overturning" of its conventional meaning under international environmental law. In order to apply the precaution, the WTO requires a scientific evidence of the actual harmfulness of a product, not just of the existence of a risk.

This overview of the shortcomings underlying the legislative framework on energy infrastructures recalls the notion of *carbon lock-in.*[121] This term was coined at the end of the 90s to explain the phenomenon of policy and market failures that inhibits the diffusion of carbon-saving technologies. According to Gregory Unruh, the synergic co-evolution of technological infrastructures, societal organizations, and governing institutional, *driven by path-dependent increasing returns to scale,*[122] has locked market and policies into a dominant fossil fuel-based energy system. Such fossil fuel-based energy system is conceptualised as a Techno-Institutional Complex (TIC). This notion, in order to be understood, needs to be deconstructed. "Technology" is not thought in terms of single artifacts, but as a *know-how* that embeds interlinked systems and subsystems of technologies. When it is associated to "system", it refers to all the *inter-related components connected in a network or infrastructure,* and thus it includes any *physical, social and informational element*.[123] The fossil fuel-based energy system, for example, is composed by various interconnected technological systems and subsystems performing generation, transmission, and supply activities, plus a host of public and private institutions and actors engaging in those activities. All these elements are co-dependently involved in the functioning, evolution, and perpetuation of this complex and they are all moved by the positive feedbacks (increasing returns to scale) that it engenders. Where established, the TIC functions as a self-sustained and self-reinforcing scheme that perpetuates itself and impedes at the same time the diffusion of other competitor technologies. The obstacles that this dominant pattern creates are not only set at market level, but also significantly at policy level. The study upholds that the fossil fuel-based TIC, induces *policy inertia toward the mitigation of climate change.*

Regardless further technical details, there are two main aspects of the study that need to be stressed in the interest of the present research: the embeddedness existing between market and political forces, as well as the path-dependency that some political actions contribute to trigger.

Public subsidies to fossil fuels infrastructures are the typical example of how political institutions exacerbate the effects of a TIC, and so they further inhibit alternative technological systems to develop and to supersede the old ones. Anyway, what best expresses and secures the perpetuation of the dominant scheme is the presence in the decision-making process of lobbies representing fossil fuel interests. The *legitimacy* enjoyed by that presence bears the most lasting effects. The statutory role granted to the ENTSOG thus reveals the political and societal internalisation of that paradigm and of its values.

[121] Gregory C. Unruh (n 5)
[122] Ibid.
[123] Ibid. p. 819

Such path-dependent process does not necessarily move through intentional and planned actions. Reminding the historical evolution of the European energy policy, the unbundling of vertically integrated monopolies and the resolution to integrate sustainability objectives within the energy policy seemed rather going in the opposite direction: that of disrupting former dominant systems and allowing the entry of new actors and technologies into the energy market. So, what did it go wrong?

Drawing some general and final conclusions on the policy mistakes contributing to a carbon lock-in would be misplaced here. The aim of this work is just to *question* the present state of affair and to reject it as something simply given or natural.

I am aware that asserting the existence of a carbon lock-in is very disputable. It basically implies the deconstruction of that system of values permeating political, market, and societal forces and that consents the perpetuation of such complex. However, where uncovered, the lock-in can be "escaped" through strategic policy actions.[124] In other words, the responsibility to correct the market and policy failures hampering the mitigation of climate change pertains to political classes.

In this regard, a path for possible changes has just been mapped out, hopefully addressing a "real escape".

Firstly, in May 2020, the Commission has opened the consultations for reviewing the TEN-E Regulation, in line with what was expected from the publication of the European Green Deal.[125]

Secondly, the European Ombudsman has just opened an inquiry against the Commission based on a complaint lodged by the NGO "Food & Water Europe". She will inspect into the *alleged failure to carry out a sustainability/climate assessment for all existing fossil fuel projects on the list of Projects of Common Interest.*[126] As already largely discussed, sustainability is a key principle of EU primary law that shall be integrated in the regulation of the internal market (art.3 of the TEU) as well as in any policy and activity (art. 11 of the TFEU; art.191 of the TFEU), such as precisely the Union energy policy (art. 194 of the TFEU). Yet, the reply provided by the Commission to the complainant appeared as an admission of the actual shortcomings existing in connection to the sustainability assessments of PCIs.[127] The Commission asserted that *has started work to improve the analytical tools and procedures it has in place to carry out a sustainability assessment of possible future gas projects as part of the cost-benefit analysis for future PCI-lists* and that it *wants the results to be fully reflected in the next (fifth) PCI-list.* Whether the sustainability assessment has

[124] Gregory C. Unruh, 'Escaping Carbon Lock-In' (2002) 30 Energy Policy, p.318
[125] Note 17
[126] Note 19
[127] See the Ombudsman's letter to the President of the EU Commission, available on: https://www.ombudsman.europa.eu/it/correspondence/en/124432.

been in fact flawed in the past, is it justified to postpone the alleged adjustments by two years for the next 5th PCI list?

We look forward to seeing the outcomes of both ongoing processes.

Part 2

The Energy Charter Treaty and the International Investment Protection Regime

1. The TAP and the Energy Charter Treaty

The TAP, as in general any trans-national infrastructure, rests on an intergovernmental agreement (IA).[128] The IA relating to the TAP has been signed between the Italian, the Albanian and the Hellenic Republics and is accompanied by two host government agreements (HGA) between the project investor and Albany and Greece.[129] Italy has not entered into a HGA, given that – as the IA states - the majority of the project is located in the other two countries. By entering into this agreement, the three States declare to recognise the strategic national importance of the project, and they promise to facilitate, enable, and support its implementation by coordinating their actions with each other.[130] Hence, they commit to, among other things, grating all the required authorisations according to their domestic laws and without unreasonable delays or restrictions.[131] Whether it fails or refuses to fulfil those obligations, the party would be responsible *in accordance to the general principles of international law.*[132] Therefore, the State breaching the IA, when challenged by the other parties, is normally obliged to immediately stop the illegal conduct (i.e. cessation) and to restore the status quo ante (i.e. reparation). With regards to the dispute resolutions, the terms employed in art.13 are equally general, by simply referring to the use of *diplomatic means*.

Besides potential inter-state disputes, the most common scenario in the case of building work disruptions is that investors would lodge complaints against the host State for redressing their losses and damages. In such event, forum and terms of these proceedings are generally established by bilateral or multilateral investment agreements - signed by the host State involved and the investor's home State – or by host government agreements.

[128] Legge 19 dicembre 2013, n. 153. Ratifica ed esecuzione dell'Accordo tra la Repubblica di Albania, la Repubblica greca e la Repubblica italiana sul progetto «Trans Adriatic Pipeline», fatto ad Atene il 13 febbraio 2013. (13G00196) (GU n. 3 del 4-1-2014) available in English on: https://www.gazzettaufficiale.it/eli/gu/2014/01/04/3/sg/pdf.
[129] Ibid. Art.5
[130] Ibid. Art. 2
[131] Ibid. Art.6
[132] Ibid. Art.11

Assuming the perspective of Italy, what would have happened if the Italian Government had endorsed the environmental activists' claim of impeding the realisation of the TAP?

In such a case, the Energy Charter Treaty would have come into play.

Art.3 of the trilateral intergovernmental agreement states "*the Project Participants shall be regarded as "Investor" for the purposes of article 1(7) of the Energy Charter Treaty and the Project and all aspects of it, and any interest they may have under any agreement relating to the Project shall be each regarded as an "Investment" into the Territory of the relevant Party for the purposes of article 1(6) of the Energy Charter Treaty."* To be clear, the Appendix to the agreement specifies that "*Project Participants means Project Investor, the Shareholders, the Shippers, the Contracts, the Lenders and the Gas Sellers",* whereas *"Project means the evaluation, development, design, construction, installation, financing, refinancing, ownership, operation (including the Transport of Natural Gas through the Trans Adriatic Pipeline), repair, replacement, refurbishment, maintenance, expansion, extension (including laterals) and, at the relevant time, decommissioning of the Trans Adriatic Pipeline."* In short, the IA defers the precious statuses of "investor" and of "investment" pursuant to the ECT to the widest range of actors and activities.

What is the ECT? And which kind of benefits the statuses of "investor" and "investment" grant?

2. The ECT and the Main Investment Standards

The ECT is a multilateral agreement regulating trade, transit, and investments in the energy sector. With regards to investments, it is the most-invoked[133] treaty in investor-State dispute settlements and it also gathers the largest membership. The idea of designing it germinated within the then European Communities, and precisely during the meeting of the European Council in Dublin in 1990. Ruud Lubbers, Prime Minister of the Netherlands suggested that a cooperation between West and East Europe in the energy sector would have been a proficient way to drive an "*economic recovery*"[134] in Eastern Europe and the Union of Soviet Socialist Republics. The proposal stressed the natural complementarity[135] existing between the large presence of natural

[133] See the updated statistics on investment arbitration cases under the Energy Charter Treaty, published 5 June 2020, available on: https://www.energycharter.org/media/news/article/updated-statistics-on-investment-arbitration-cases-under-the-energy-charter-treaty/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=c06700cf198e364baf7f478afa580f2b.

[134] Final Act of the Conference p. II on the "Background". Online on: https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1994_Final_Act.pdf

[135] Communication from Commission of the European Communities on the European Energy Charter, Brussels, 14 February 1991, COM (91) 36 p.2 which refers to the memorandum submitted by Mr Lubbers on the establishment of a European Energy Community.

resources in the East, which was in turn eager for capitals and acquisition of industrial technologies, and the West's interest in securing and diversifying[136] its energy supply. Consequently, the Commission of the European Communities, invited to implement this idea, came out proposing the so-called European Charter Treaty. The negotiations upon this document took place in Brussel in July 1991 and gathered, next to the European Communities representatives, other western and eastern European countries, non-European members of the OECD, and a host of States and international organizations to assist as observers. The final signature of the Charter[137] was promptly followed by the negotiations of the ECT aimed at implementing these political declarations. The original timetable was ambitiously tight, setting within the following six months the adoption of the ECT. Yet, the schedule overshot by two years, which was however a modest period considering the novelty, complexity[138] and sensitivity of the treaty's scope. The time to finalise the undertaking seemed anyway to be the most appropriate: the disintegration of the URSS[139] met the process of integration and liberalisation of the European internal market. Under the auspices of the European Communities, the ECT was signed in 1994 and entered into force on April 16, 1998.

The legal framework of the ECT appears to perfectly embody the ideology of that "promising" time of change that the post-Cold War era represented in Europe.

The hard-law core of provisions relevant to investments are located in the Part III (artt.10 to 17), although many others are spread out in the treaty.[140] The notions of "investment" and "investor" delimit the scope of application of the protection regime.

The concept of "investment" is largely comprehensive, by including basically any legal right of financial value related to the energy sector.[141] Abandoning the traditional notion including only tangible property, the ECT embraced the practice, prevalent among the BITs in the 80s and 90s, of stretching the notion "property" over any economic asset.[142] Although the ECT distinguishes for

[136] Julia Dorè, 'Negotiating the Energy Charter Treaty', *The Energy Charter Treaty. An East-West Gateway for Investment and Trade* (Kluwer Law International), p. 139 most countries were tightly dependent on oil import from Middle East, which was going through a severe political instability due to the Iraqi invasion of Kuwait.

[137] The European Energy Charter was adopted by signature of a Concluding Document at the Hague Conference, held on 16-17 December 1991.

[138] The ECT is divided in 8 Parts and was conceived with 14 Annexes; Conference decisions are incorporated within the body of the treaty by reference; there are several Understanding, Declarations from the act of the Conferences, and statements from the Chairman of the Conferences to take into account as interpretative tools.

[139] Occurred officially the 8th December 1991 with the Belovezha Accords establishing the Commonwealth of Independent States (CIS)

[140] Thomas Wäelde, 'International Investment under the 1994 Energy Charter Treaty. Legal, Negotiating and Policy Implications for International Investors within Western and Commonwealth of Independent States/Eastern European Countries', *The Energy Charter Treaty. An East-West Gateway for Investment and Trade.* (Kluwer Law International 1996), p. 270 provides a comprehensive overview of all other relevant investment provisions.

[141] ECT Art. 1(6) and the relative Understanding. See the consolidated version of the ECT on https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf

[142] Jeswald W. Salacuse, 'The Energy Charter Treaty and Bilateral Investment Treaty Regimes', *The Energy Charter Treaty. An East-West Gateway for Investment and Trade* (1996), p. 331-332.

scope and intensity the protection conferred to pre-investment/access[143] and post-investment issues, the notion of "investment" is so open-ended that the stricter post-investment regime is likely to expand over a host of initial commitments of money.

The complementary notion of "investor"[144] includes natural persons with nationality or permanent residency in one of the Contracting parties and companies incorporated in the territory of a Contracting party, but only where investors own or control directly or indirectly the substantial business - as the exemption clause of art.17(1) specifies.[145] Where instead Member-State shareholders controls non-Member company,[146] there are no reasons to believe that the Member-State shareholders can rely on the Treaty's protection, given the "limiting" nature of art.17.[147]

The ECT provides for a very comprehensive spectrum of protection for those falling within these two categories. Art.10 refers to all the standards of protection that have been developed until that time.[148] As commonly in use in IIAs, the ECT does not define those principles, so that their scope of application has to be drawn from international customary law and the practice of arbitral tribunals.

It worth mentioning that the principles of most-favoured nation (MFN) treatment[149] and of international minimum standards,[150] which regularly appear in modern IIAs, are combined with that of national treatment.[151] The principle of national treatment, that has historically been a subject of

[143] Thomas Wäelde (n 146), p. 277-284. The ECT does not clearly differentiate the two regimes; generally speaking, one can refer to pre-investment obligations any time art.10 refers to the condition of "promoting" investments. Access obligations were a thorny topic in the negotiations, as they were considered to be a matter pertaining exclusively to sovereign rights by many countries (that of deciding which kind of investments could accede their territory and under which conditions). For these reasons, the pre-investment obligations are covered by soft-law, enforced by state-to-state dispute resolutions (art.27) where complaints arise.

[144] ECT art. 1(7) and the Understanding.

[145] ECT art.17(1) exclude from the protection regime "*a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised"*

[146] This case was debated in the famous *Barcelona Traction* lawsuit (1970, second phase) regarding a Canadian company with Belgian shareholders operating in Spain. Belgium filed a case before the ICJ against Spain to seek reparation for the damages sustained by the Belgian nationals, as a result of acts committed towards this company by the Spanish authorities. The Court rejected Belgian Government's jus standi (paras. 32-101 of the Judgment). See the summary on https://www.icj-cij.org/files/case-related/50/5389.pdf

[147] Thomas Wäelde (n 146), p. 275.

[148] Orsat Miljenić, 'Energy Charter Treaty – Standards of Investment Protection' (2018) 24 Croatian International Relations Review 52., the author enumerates: fair and equitable treatment; most constant protection and security; prohibition of unreasonable or discriminatory measures; national treatment; most favoured-nation standard; umbrella clause; standard of effective means to assert the claims.

[149] In art.10(3) it appears as a soft-law principle for pre-investments, in art.10(7) as a binding standard for post-investments. Thomas Wäelde (n 146) p.293-294 pointed out that *"treatment" must be read restrictively: it does not apply to specifically negotiated deals,* namely it does not mean extending to any investor a favourable contractual condition bargained. *But applies when a government "treat" - foreign investors, from its legally superior position as a regulatory and administrative power, without transactional, equal-level negotiation.*

[150] ECT art. 10(1) "*In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations"*

[151] The standard of national treatment can be inferred from art. 10(3) and (7) when it refers to *treatment no less favourable than that which it accords to Investments of its own Investors.*

dispute between capital- exporting and -importing States, is deployed in an unconventional fashion, for that time. The "national treatment" was in fact originally claimed as part of the Calvo Doctrine[152] by developing countries and contested by capital-exporting countries asking for an international standard of treatment. However, in this forum it has to be read as a strategy to impede protectionist measures: it is integrated its "favourable" element of *non-discrimination vis-à-vis national business, while countervailing the negative element, i.e. the application of possibly low-quality standards to foreigners, by the inclusion of international minimum standards.*[153] This arrangement fully addressed the Western concerns of both providing a full protection to their national investors and of fostering a market economy model - mostly in the former Soviet bloc undergoing economic transition - by barring protectionist policies.

Another feature, reflecting the capital-exporting countries' approach, is the regulation on expropriations, which starkly departs from the former communist attitude in Eastern Europe towards property and nationalization.[154] Art.13, while recognizing that expropriations can occur in the name of public interest, requires the payment of a "prompt, adequate, and effective" compensation for that. This standard of compensation is known as the Hull Rule and it is named after the United State Secretary of State Cordell Hull.[155] The provision also requires that the compensation has to amount to the "fair market value" of the property, to be calculated *at the time immediately before the expropriation;* it thus rejects the "book-value" criterion put forward in the 70s by the nationalizing countries.[156] A novel element, that might engage the "carbon tax" debate about climate policies, is the presence of the "confiscatory taxation" among the forms of indirect expropriation laid down (also called "creeping expropriation" or "constructive taking").[157] Although this element appeared already in some BITs, its novelty consisted in the extension of the international arbitration upon tax measures. This clause raised a doubt about the balance to strike between the fiscal power of host States acting for the public good (such as implementing higher carbon taxes to pave the way to phase out fossil fuels) and the investors' legitimate interests.

[152] O Thoman Jr Johnson and Jonathan Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law' [2011] Yearbook on International Investment Law & Policy.
[153] Thomas Wäelde (n 146), p. 291
[154] M. Sornarajah, 'Compensation for Nationalization: The Provision in the European Energy Charter', *The Energy Charter Treaty. An East-West Gateway for Investment and Trade* (Kluwer Law International 1996), p. 386- 408.
[155] Johnson and Gimblett (n 158). Hull enunciated this principle in his correspondence with the Mexican government in 1938. At that time, a land reform was occurring in Mexico and it resulted in the expropriation of several properties belonging to American citizens.
[156] Thomas Wäelde (n 146) p.300
[157] Ibid. p. 301, the author refers to art. 13, 21(5), and 26

In order to stretch as much as possible the protection shield upon the foreign investor's business, the ECT relies on the so called "umbrella clause".[158] The clause places any investment-related contractual obligation directly under the protection of the Treaty, so as under the arbitration instrument. . Art.26(3)(c), anyway, provides the signatory States with the reservation of exempting disputes raising under such clause from arbitration.[159]

Anyway, the most invoked standard in arbitral disputes remains the "fair and equitable treatment". It is considered to include five main obligations for the host State, namely that of prohibiting: manifest arbitrariness in decision-making; denial of justice and disregard of the fundamental principles of due process; discrimination; abusive treatment; and defeat of the investor's legitimate expectations.[160] "Legitimate expectation" is probably the most controversial issue. It is said to rest on *the host state's legal framework and on any undertakings and representations made explicitly or implicitly by the host state.*[161] This means considering either the specific commitments the State has taken with the investor (e.g. stabilization clauses) and *rules that are not specifically addressed to a particular investor, but which are put in place with a specific aim to induce foreign investment and on which the foreign investor relied in making his investment.*[162] However, the prohibition to contradict legitimate expectations should not freeze the host state's legal regime, yet it just requires that policy amendments shall be made fairly, consistently and predictably (i.e. made in bona fide).[163] Identifying a breach, therefore, equates to balancing the investor's with the host State's legitimate interests, taking into account the State's duty to protect public interests as well as the investor's confidence in a stable and predictable legal framework.[164] In the estimation, the consistency, stage, and duration of the investor-State relationship have a bearing. The more funds the investor commits to a project, the less flexible would be divesting them; therefore, a long-standing business usually increases the investor's legitimate expectations of stability and protection.[165]

[158] ECT art. 10(1) "*Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party*."
[159] Art.26 (3)(c) reads *A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).*
[160] United Nation Conference on Trade and Development, Fair and Equitable Treatment UNCTAD Series on Issues in International Investment Agreements II, 2012 available on https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.
[161] Miljenić (n 154), p.58 refers to Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012), p.145
[162] Ibid. p.60
[163] Ibid. p.61
[164] Ibid.
[165] Ibid. p.57

3. The Swings of a Pendulum

Whereas part III brings together the most comprehensive protection to investors, art. 26 provides for its solid enforcement. The formulation of the provision, compared with other ambiguous parts of the Treaty, stands out for its clarity, which might reflect the centrality that this issue played in the negotiations. The investor is entitled to bring direct actions against the ECT's member State for breach of Part III obligations, without need for a prior arbitral agreement with the host state (i.e. without privity) and without prior exhaustion of local methods. At that time, these two combined aspects represented a novelty, among the patterns followed by BITs, and a distinct endorsement of the "Western" ideology adverse to the sovereignty rights-oriented stance. Let's see why, by traversing some of the main stages in the historical evolution of the investor-State dispute settlement (ISDS) clause.

The first Friendship, Commerce, and Navigation (FCN) treaties, negotiated by the US since the XVIII century, used to deal indistinctly with both trade and investment; they excluded individuals from any dispute resolutions - according to the conventional view excepting privates from the status of subjects of international law.[166] Trade and investment disputes were in this way regulated through inter-States diplomatic negotiations. To be clear, US and European claims, where peaceful diplomacy was unsuccessful, were commonly addressed by threatening of military intervention; this was the so called "gunboat diplomacy".[167]

From the mid-19th century, the Western approach has been fiercely challenged by the Latin American States espousing the Calvo Doctrine.[168] The Argentine jurist's teaching was based on three tenets: the national treatment of the alien's property; the exercise of national jurisdiction for dispute settlement; and the denial of military or diplomatic intervention by the investor's home State in the host State affairs. Later in the inter-war period, the Latin American model widely spread, under the momentum of the Soviet and Mexican revolutions and of the wave of mass expropriations occurring in those territories. As part of general land reforms, most of the expropriations executed that time remained uncompensated**;** this fact triggered a further debate,

[166] Kenneth J. Vandevelde, 'Arbitration Provisions in the BITs and the Energy Charter Treaty', *The Energy Charter Treaty. An East-West Gateway for Investment and Trade* (Kluwer Law International 1996), p.410
[167] Johnson and Gimblett (n 158).
[168] Ibid. p. 656 It refers to Carlos Calvo, Derecho Internacional teórico y práctico de Europa y América, 1868 where it is stated that "*foreign nationals were entitled to treatment no greater than that afforded to nationals under the laws of their countries of residence, located exclusive jurisdiction over investment disputes in the national courts of the host State, and denied the right of States to intervene militarily or even diplomatically in the affairs of other States in exercise of a claimed right of diplomatic protection"*

between the US and Soviet ideological blocs, over the standards of compensation, which led to the emergence of the above referred Hull Rule.

Trade and investment regulations of disputes fully separated, in the aftermath of the Second War World. The trade regime crystallized within the GATT system, while international investment law continued to evolve without taking a homogeneous form. The main difference between trade and investment international legal frameworks lies in the fact that the trade regime endorses the traditional view excepting private individuals from the status of subjects of international law. This departure can be noticed in the ECT dispute resolution's architecture: whereas investment disputes can accede both investor-State arbitrations (art.26) and State-to-State ones (art.27),[169] trade disputes are only deferred to inter-States arbitrations (art.27), and where the contracting parties are also GATT members, the settlement is directly remitted to the GATT mechanisms (art.28, 29).

Some attempts were made, however, within the GATT regime to codify an investment multilateral agreement. The Havana Charter, for instance, which laid the foundations to the International Trade Organization (ITO), included a provision on investments. The insertion mounted a heated debate dividing developing and industrialised world. The timing was too premature to aspire to an agreement on such politicized issue. The Charter indeed never came into force.[170] A second try was made later during the Uruguay Round, yet even in this occasion the developing country resistance halted the process. After difficult negotiations, the only result the parties could agree upon concerned the trade related investment measures (TRIMs).[171] In view of the enduring opposition from the Third World, the US prompted to move the negotiations in the OECD, since reaching an agreement in this forum was thought to be simpler. The negotiations of the Multilateral Agreement on Investment (MAI),[172] indeed, involved only capital- exporting countries and the business community, represented within the Business and Industry Advisory Committee (BIAC). Yet, once concluded, the treaty was planned to have worldwide application and be opened to the signature of developing countries. However, not only this project ruinously failed,

[169] Kenneth J. Vandevelde (n 172), p. 419. Inter-States arbitrations can be employed for trade and investment disputes; according to art.27, the parties are first required to try to settle through diplomatic channels, before deferring the dispute to an ad hoc arbitral tribunal. In short, the tribunal consists of three members: each party involved in the dispute chooses one member and appoints the third member in agreement with the other one. Where there is not agreement between the parties, the appointing faculty is transferred to the Secretary-General of the Permanent Court of Arbitration. The arbitration shall be governed by the Arbitration Rules of UNCITRAL and the award once released shall be final and binding.

[170] Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge University Press 2009), p.43.

[171] Katia Tieleman, 'The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network' [2000] UN Vision Project on Global Public Polivy Network.

[172] The Multilateral Agreement on Investment, draft consolidated text, DAFFE/MAI(98)7/REV1, Organisation for Economic Co-operation and Development, 22 April 1998

but the exclusion of the Third World and of NGOs in the drafting process also caused the backlash of a huge and strong campaign against it, which eventually got the better of it.

The main reason that politicizes the debate upon investment regulation between developed and developing countries, and that signed the departure of trade framework from the investment one, rests on the nature of such capital flows. Whereas trade flows *move in both directions across a border*, investment flows frequently *move in one direction only*, [173] namely from wealthy to poor countries. The bilateral direction of trade flows, unlike investments, allows States victims of protectionist policies to be redressed through retaliations against their trade partners breaching free trade agreements; this is the context permitting the current WTO system to work.[174] The unilateral direction of investment flows has, on the contrary, always put capital-exporting and -importing countries on an asymmetric position for bargaining their regulation.

Being such a political issue, the development of investment customary norms has been mainly directed by the evolutions in the international geopolitical order, and more precisely by the balances of power between the "Western" and the "Third World" sides, and between the US and Soviet blocs. It resembled the *swings of a pendulum,*[175] by alternately expressing, over the decades, the dominant positions within these antagonisms

Accordingly, between the 60s and 70s, thanks to the advancement of the decolonization process and the affiliation of the newly independent States within the Non-Aligned Movement, the General Assembly passed Resolutions having significant bearing on the shape of investment law customs. These are the Res. 1803 on "Permanent Sovereignty over Natural Resources" (1962);[176] the Res. 3201 "Declaration on the Establishment of a New International Economic Order" (1974);[177] and the Res. 3281 adopting the "Charter of Economic Rights and Duties of States" (1974).[178] Overall, they aimed at reasserting sovereign rights within the evolving international economic order. The NIEO

[173] Kenneth J. Vandevelde (n 172). p. 412

[174] In very broad terms, the allegations of a violation are first brought before the WTO panel, which issues a ruling on the consistency of the State's measure being complained with the WTO regime. Either parties can appeal the panel's decision to the WTO Appellate Body, whose verdict instead is final. The losing defendant is given a certain period of time to comply with the decision and restore the situation to the status quo ante the violation; the enforcement is overseen by the WTO's Dispute Settlement Body. Where failing to comply, the complaining party is automatically authorized by the Dispute Settlement Body to "retaliate" against the defeated country, by imposing trade sanctions.

[175] Thomas Wäelde (n 146), p. 251.

[176] The resolution recognises the State's right to expropriate private properties over national natural resources, and in this regards it states *"[i]n such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law"*

[177] It asserts that "*"[n]o State may be subjected to economic, political, or any other type of coercion to prevent the free and full exercise of this inalienable right*".

[178] It reads "*the obligations of a State that expropriates the property of an alien is, in the end, defined solely by the law of that State.*" See S. K. Chatterjee, 'The Charter of Economic Rights and Duties of States: An Evaluation after 15 Years' (1991) 40 The International and Comparative Law Quarterly 669 on the background of the Resolution and the divide between developed and developing world in the negotiations.

and the Charter, unlike the Permanent Sovereignty Declaration,[179] were endorsed by the communist bloc. Especially the NIEO, fiercely criticized by the opponents,[180] has been described the *reverse mirror image* of the ECT's investment regime,[181] for the way the New Order emphases *the exclusive application of national law* to compensate expropriations and to settle investment disputes (i.e. Calvo doctrine), and the *preferential rights in numerous field (technology, finance, aid, trade)* that the resolution accorded to developing countries.[182]

Another complementary action, concerted by developing countries in the 70s, was conceived within the UN Centre on Transnational Corporations (UNCTC) and aimed at codifying a code of conduct and obligations for investors.[183]

All these initiatives, however, besides their political contribution, did not eventually produce any legally binding result.

Differently, the engagement going in the opposite direction had a much lasting effect. The building of the legal architecture protecting private investors advanced considerably, in a way very adherent to the Western interests. In 1965, the Convention on the Settlement of Investment Disputes Between States and Nationals of the Other States was tabled and opened to signatures. It instituted the first entity – the International Centre for Settlement of Investment Disputes (ICSID) affiliated to the World Bank – to conciliate and arbitrate arbitral disputes between foreign investors and host states. Thereafter, the BITs deferring disputes to the ICSID enable the investors to sue the host State before this entity, where both the investor's home State and the host state had ratified the ICSID Convention. In 1978, a second mechanism of arbitration and conciliation before the ICSID, the Additional Facility for the Administration of Proceeding, was established to deal with cases not covered by the previous Convention. Through this instrument, ISDS was available even when one of the two parties of the BITs was not an ICSID's party. Both instruments are contemplated within the ECT's dispute settlement provision (art.26). However, unlike the ECT which functions without privity, a specific arbitration agreement between the government and the investor was still required for both these instruments. Finally, not to be overlooked is the role of the OECD's guidelines,[184] as

[179] Stephen M. Schwebel, 'The Story of the UN's Declaration on Permanent Sovereignty over Natural Resources' (1963) 49 American Bar Association Journal 463.
[180] Robert B. Vanasse, 'The UN New International Economic Order. A Brief Analysis' (1988) 150 World Affair 233. The article refers to it as a *symbolic order professing the socialist credo*, based on *inconsistent* and *contradictory* economic theories.
[181] Thomas Wäelde (n 146) p. 263
[182] Ibid.
[183] The UN Code of Conduct on Transnational Corporations. According to Tienhaara (n 176). p. 27 *due to opposition from developed countries, an economic recession and the debt crisis, the drive to adopt the UNCTC Code faded in the 80s. Despite an attempt to revive it in 1990, the UNCTC was officially dismantled in 1992*
[184] Thomas Wäelde (n 146) p.259 it is mentioned: *a draft convention on the protection of foreign property (1967); the OECD Codes of Liberalisation of Capital Movement and Current Invisible Operations (1961); the Declaration on*

well as of the European Community directives integrating the single market,[185] in strengthening the investor's shield.

The stark change of paradigm in favour of the investor's protection has anyway coincided with the collapse of the URSS. The *swing* towards privatizations, market liberalisation and deregulation can be assessed against the ratification of several regional commercial partnerships, the exponential proliferation of BITs,[186] the abolition of restrictive regional investment code (Decision 24 of the Andean Pact in 1991),[187] and, last but not least, the failed attempt to codify the above mentioned code of conduct for transnational corporations within the UNCTC.[188] In 1992, the World Bank released the Foreign Investment Guidelines which clearly exemplify the prevailing attitude: it exclusively focuses on how governments should treat foreign investors in order to attract investments in their territory, ignoring the conduct and obligations demanded in turn to foreign investors.[189] The prominence gained by the notion of Corporate Social Responsibility (CSR) has seemingly further entrenched the asymmetry underpinning the investment regime, where the strict and enforceable norms protecting investors confront the non-binding social and environmental standards applied to them.[190]

Anyway, the major shift, in the post-Cold War era, concerns the approach of developing countries. Mistrust and fear of being deprived of political and economic independence have been replaced by a competition race to attract foreign capitals. In academia and in the common sense, foreign investments have become the precondition of "economic growth" in lower-income countries and the channel for the transfer of "best international practices", even when it comes to environmental protection.[191] This is the rationale that has been woven into the fabric of the ECT, and that is currently driving its membership expansion in the global south.[192]

Decisions on International Investment and Multinational Enterprises (1976).

[185] Ibid.

[186] In Johnson and Gimblett (n 158) is described as the "BITs era" (1989- present)

[187] Thomas Andrew O'keefe, 'How the Andean Pact Transformed Itself into a Friend of Foreign Enterprise' (1996) 30 The International Lawyer 811

[188] Note 62

[189] Thomas Wäelde (n 146). p. 264

[190] See European Commission, Promoting a European Framework for Corporate Social Responsibility, green paper of 18 July 2001, COM(2001)366, CSR is a *concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.*

[191] Tienhaara (n 176). pp. 18 ff. The author mentions the widely known Environmental Kuznets Curve (EKC) elaborated by Grossman and Krueger in the 90s. According to this theory, once reached a level of per capita income, the level of polluting activities should stabilize and then decrease - based on a compositional shift from a manufacturing to service-oriented economies. However, this theory has come in for strong criticisms, among which the fact that it does not account for the consumption of products, happening in higher-income countries, whose polluting production has been relocated in lower-income states. The author reassumes these criticisms in pp. 19-21.

[192] Pia Eberhardt and Cecilia Olivet, 'Silent Expansion. Will the World's Most Dangerous Investment Treaty Take the Global South Hostage?' (Corporate Europe Observatory (CEO), Transnational Institute (TNI), Southern and Eastern African Trade Information and Negotiations Institute (SEATINI) 2020).

4. ISDS under the Energy Charter Treaty

As already anticipated, the ECT regulation of ISDS is the best expression of such international change of paradigm. It contemplates a duty to first negotiate amicably within at least three months, as the dispute arises;[193] thereafter, where the investor is not satisfied by the negotiation, art.26 set three alternative mechanisms of dispute settlement. The claim can be referred to the host State's courts and administrative tribunals, or it can be settled through a previously agreed dispute settlement procedure, or finally the investor can open an international arbitration procedure under the Treaty.

Unlike the international law customs at the time, on the one hand the exhaustion of domestic remedies is not a requirement to access to international arbitration, but rather one alternative among others; on the other hand, the investor can circumvent the previously agreed forum, by directly deferring the dispute to one of the fora defined by the ECT.

Moreover, art.26 functions as a super-appeal instrument for investors, where the first ruling from a domestic courts or from a contractual forum does not indulge their interests. In other words, the Treaty admits, after having filed a case before a domestic court or the forum agreed in a separate agreement, to subsequently (when the first proceeding has run all its course, i.e. principle of litispendence) turn it to one of the arbitral fora provided for in the treaty. Yet, some doubts exist about the relationship between the treaty's and the contractual arbitrations. According to some, the investor *cannot appeal against an arbitral tribunal's award, providing an equivalent form of independent justice to one of the Treaty's arbitration tribunals.*[194] Where the forum of jurisdiction is freely negotiated between investor and government, the special contract-based law shall prevail over the general Treaty-based provision.

Despite this, signatory parties are allowed with a declaration to waive the super-appeal option.[195] The reservation prevents the decisions of the local courts to be overridden and to bear the burden of multiple contestations over a single dispute. Thereby, the backlash of the declaration consists in discouraging the claimant investor to resort to mechanisms other than the arbitration under the Treaty, which offers by the way a diverse range of instruments. Investors can choose among the

[193] Art.26(1) and (2)
[194] Thomas Wäelde (n 146) p.306-307
[195] Art. 26(3)(b)(i) the States having provided the written statement are listed in Annex ID.

above stated ICSID Convention and Additional Facility, the UNCITRAL Arbitration Rules, and the Stockholm Chamber of Commerce model.[196]

The established tribunal shall decide in accordance with the Treaty and the rules and principles of international law;[197] and the released award shall be final and binding upon the parties of the dispute.[198]

Just to further emphasize, the normative structure is completely unilateral. The government is excluded from resorting to these instruments if the investor breaches its obligations; in these cases, States can only rely on national laws or other means offered by a separate contractual agreement with the investor. However, in case an arbitral tribunal has been already seized by the investor, the government should be admitted to counterclaim in that forum.

Overall, the provision is far-reaching not only for the mechanisms of settlement made available to the investor, but also for the scope of its application.

Due to such comprehensive protection regime, it is easy to believe that the ECT is the most-invoked treaty in ISDSs,[199] as it is to understand the warning that the Italian Prime Minister launched in his letter to the city of Melendugno (LE) about the TAP case. Should Italy halt the building work, he claimed, there would be a long litigation with the investors, very likely to cost to Italy a compensation ranging between EUR 20 and 35 billion. Notably, Italy withdrew from the ECT in 2016, but under its so-called survival clause,[200] the withdrawal will take effect only after 20 years from that date.[201]

Being so impactful over States' actions, ISDSs continue today as in the past to stir much controversy.[202] As arbitrations can be kept confidential,[203] it is impossible to track all those

[196] Anna Turinov, '"Investment" and "Investor" in Energy Charter Treaty Arbitration: Uncertain Jurisdiction' (2009) 26 Kluwer Law International 1 the author canvasses the differences, and potential advantages and disadvantages, between the ICSID, the UNCITRAL, and the Stockholm Chamber of Commerce (SCC) models of arbitration.
[197] Art.26(6)
[198] Art.26(8)
[199] Note 12
[200] ECT art.47(3).
[201] According to the UNCTAD's IIA Mapping Project only 387 out of 2576 IIAs mapped out contain such a clause of 20 years. See on https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping#iiaInnerMenu (accessed in July 2020).
[202] Pia Eberhardt, Cecilia Olivet and Lavinia Steinfort, 'One Treaty to Rule Them All, The Ever-Expanding Energy Charter Treaty and the Power It Gives Corporations to Halt the Energy' (Corporate Europe Observatory (CEO) and the Transnational Institute (TNI) 2018).
[203] See Nathalie Bernasconi-Osterwalder Martin Dietrich Brauch, 'The State of Play inn Vattenfall v. Germany II: Leaving the German public in the dark',(IISD, 2014), available on: https://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf. The authors analysed the debate between transparency and confidentiality, with regards to arbitrations under the ICSID Convention and Arbitration Rules. They point out that in one previous case - *Abaclat v. Argentina* - the tribunal confirmed that *"unless there exist an agreement of the Parties on the issue of confidentiality/transparency, the Tribunal shall decide on the matter on a case by case basis and, instead of tending towards imposing a general rule in favour or against confidentiality, try to achieve a solution that balances the general interest for transparency with specific interests for confidentiality of certain*

proceedings. However, some of them, once become public, have disclosed some common alarming patterns. Let's browse few exemplary cases triggered precisely under the ECT.

Among the most renowned are the disputes that have opposed the Swedish energy company Vattenfall to Germany.[204] The first occurred in 2009,[205] when Vattenfall sued Germany seeking a compensation of EUR 1.4 billion, after the government imposed an environmental restriction on one of its coal-fired plant under construction along the Elbe River. The dispute could be settled only in 2011, when the legislator agreed to relax the environmental policy. The second dispute was raised just one year later; Vattenfall, this time, asked for EUR 4.3[206] billion because the German Parliament, in the aftermath of the Fukushima disaster, accelerated the nuclear phase-out by ordering the decommission of several reactors, including those of the company's in Brunsbüttel and Krümmel.[207] The case is still pending, after the arbitral tribunal rejected Germany's request to dismiss all the claims pending in view of the ECJ judgement in the Achmea case.[208]

Back to the Italian Adriatic coasts, the Rockhopper v. Italy[209] dispute followed the re-introduction in 2016 of a general ban on oil and gas exploration and production within the 12-miles of the Italian coasts. The Parliament's restriction, prompted by a long-standing opposition from civil society, led to the refusal of the oil drilling concession to the UK company in the Ombrina Mare site. Rockhopper sued Italy for an amount of about US$40 to 50 million of sunk costs.[210] As in

information and/or documents." See Abaclat and Others v. the Argentine Republic (formerly, Giovanna A Beccara and Others v. the Argentine Republic) (ICSID Case No. ARB/07/5), Procedural Order No. 3 (Confidentiality Order) of January 27, 2010, retrieved from http://www.italaw.com/sites/default/files/casedocuments/ita0002.pdf, para. 73*)*. As regards instead the commercial arbitration models, see Marlon Meza-Salas, 'Confidentiality in International Commercial Arbitration: Truth or Fiction?' [2018] Kluwer Arbitration Blog, on http://arbitrationblog.kluwerarbitration.com/2018/09/23/confidentiality-in-international-commercial-arbitration-truth-or-fiction/?doing_wp_cron=1596716926.3468010425567626953125.

[204] See the briefings published by International Institute for Sustainable Development (IISD) available on: https://www.iisd.org/project/vattenfall-v-germany

[205] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (ICSID Case No. ARB/09/6). See on the UNCTAD Investment Dispute Settlement Navigator https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/329/vattenfall-v-germany-i- ; see all the available documents on the Italaw's case page on https://www.italaw.com/cases/1148

[206] Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12. On the UNCTAD Investment Dispute Settlement Navigator https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/467/vattenfall-v-germany-ii-; on the Italaw's case page https://www.italaw.com/cases/1654.

[207] See the detailed background of the dispute in Nathalie Bernasconi-Osterwalder and Rhea Tamara Hoffmann, The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v. Germany (II), IISD, June 2012

[208] Judgment of the CJEU, Slovak Republic v. Achmea B.V., Case C-284/16, 6 March 2018, EU:C:2018:158.

[209] Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic(ICSID Case No. ARB/17/14). See on the UNCTAD Investment Dispute Settlement Navigator https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/800/rockhopper-v-italy; the Italaw's case page on https://www.italaw.com/cases/5788

[210] The amount of compensation requested is covered by confidentiality, however in Pia Eberhardt, Cecilia Olivet and Lavinia Steinfort (n 208) p. 34 note 91 the authors refer to the Oil Capital Conference in which the Rockhopper Exploration CEO, Sam Moody, reveals the amount https://www.oilcapital.com/companies/news/308061/rockhopper-exploration-ceo-sam-moody-presents-to-investors-at-the-oil-capital-conference-8061.html (19 min.)

Vattenfall II, the case is still pending and Italy's request to suspend the proceedings, in consideration of the Achmea Judgement, has been denied by the arbitral tribunal.

Finally, it is significant mentioning a further common situation faced by signatory parties: that of disputes not yet landed in an arbitral tribunal, but threatening of doing so.[211] Under this category, there is a case involving the oil and gas company Vermilion and France. Despite the scarce information,[212] we know that the company, in some letters sent to the French Council of State in August 2017, claimed that the Hulot draft law, proposing a ban on renewals of oil and gas exploitation permits, would have breached the ECT. Some NGOs assert that this "warning" ultimately watered down the final version of the law which in fact allows the renewal of those permits until 2040.

The above cases have been chosen since they share a similar pattern. They have all been triggered by favourable amendments of the environmental policies. Mostly invoking "indirect expropriations" or violations of the "fair and equitable treatment" clause, investors sought exorbitant compensations by the State for their sunk costs and lost profits. Moreover, claiming such compensations as well as threating to do so has seemingly impacted, or would be likely to impact, on the development of environmental and climate regulations. In this regards, these cases want to exemplify two recurrent scenarios induced by ISDSs.

5. Regulatory Chill and Intra-EU Disputes

Vattenfall I exemplifies the frequent situation in which States decide to withdraw a stricter environmental measure or to relax it so as to avoid paying compensations. Vermilion v France, instead, portrays a circumstance, far more difficult to monitor, in which States equally surrender in front of the sole threat of arbitration.

Arbitrations have the power to intimidate States. On the one hand, the compensations awarded by arbitral tribunals have been often denounced as unfairly overestimated by studies monitoring

[211] Tienhaara (n 176) pp. 217-266 is devoted to "The threat of arbitration"; the author examines conflicts over environmental policies occurred in Ghana, Indonesia and Costa Rica, and other disputes over domestic court proceedings occurred in Indonesia and Ecuador.

[212] Eberhardt P, Verheecke L, Olivet C and Cossar-Gilbert S , 'Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked Justice' (Corporate Europe Observatory, the Transnational Institute and Friends of the Earth Europe/ International 2019).

ISDSs.[213] On the other, even just legal and arbitration fees can represent a threat. They might be affordable for developed countries - although it is at least questionable whether this is the proper allocation for taxpayers' money – but they are frequently not for developing countries.[214] Thereby, the expansion of the ECT membership in the Global South[215] could exacerbate the difficulties that developing countries normally encounter for strengthening environmental and climate policies.

In sum, the two cases express a well-known phenomenon prompted by investor-States arbitral disputes: that of *regulatory chill*. In principal, art.18 of the ECT recognises *state sovereignty and sovereign rights over energy resources* and the complementary *right to regulate the environmental and safety aspects* regarding exploration and exploitation of such resources. Yet, ISDSs and their costs are a sword of Damocles upon States, which visibly weakens public endeavours to enhance and strengthen climate and environmental actions.

The second scenario to be analysed concerns intra-EU disputes under the ECT, a topic which has gained great attention in Europe in the aftermath of the above mentioned Achmea case.

Briefly as to the case context, the dispute originally took place between the Dutch company (Achmea) and the Slovak Republic, after the State decided to partially reverse the norms privatizing its health insurance market. The UNCITRAL tribunal instituted in Germany ultimately awarded EUR 22.1 million to the company for the damages suffered. Slovakia then appealed German courts against the verdict, by claiming the lack of jurisdiction of the arbitral tribunal. From its accession to the EU, the State derived the incompatibility of the BIT's arbitration clause (Art.8 of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, the "Achmea BIT")– upon which the arbitral tribunal jurisdiction was based - and the EU law. Once reached the German supreme court, the case was deferred to the CJEU for a preliminary ruling on such alleged incompatibility.

The CJEU, in a landmark decision,[216] confirmed such incompatibility based on three main findings.

First, the BIT provision called the arbitral tribunal to decide on the basis of *the law in force of the Contracting Party concerned* and of *other relevant agreements between the Contracting Parties* (Art.8(6) of the BIT). Thus, the formulation basically invited the tribunal to interpret and apply,

[213] The largest ISDS award ever, of US$50 billion, has been issued under the ECT against Russia in the Yukos cases in 2014. See Pia Eberhardt, Cecilia Olivet and Lavinia Steinfort (n 208) p.25-26. However, *the Hague District Court reversed the awards on the grounds that the arbitral tribunals lacked jurisdiction since the Russian Federation had signed the Energy Charter Treaty, but never ratified it.* See on the ECT website: https://www.energycharter.org/media/news/article/50-billion-arbitration-awards-against-russia-quashed/
[214] Tienhaara (n 176) pp. 128; 148-150.
[215] Pia Eberhardt and Cecilia Olivet (n 218).
[216] Note 87

among others, the EU law (para. 39-42). Second, departing from the Advocate General's opinion,[217] the Court found that investment arbitral tribunals are not part of the MSs judicial system,[218] and consequently they are not entitled to refer to the Court for a preliminary ruling on whatever concerns the interpretation and application of EU law (para.43-49). Third, the Court looked finally into whether, in that setting, arbitral awards were liable to review from a Member State's domestic court, thus ensuring that questions of EU law could be submitted to the CJEU via preliminary ruling (para.50-55). In this regards, the Court made two points. According to art.8 of the Achmea BIT the arbitral award should have been final (not subjected to appeal). According to UNCITRAL arbitration rules, the external lex arbitri to apply (governing judicial supervision and control over the proceedings, such as the scope of intervention of local courts) was the German law, since the arbitral tribunal chose its seat in Frankfurt am Main. The Court held that the extent of judicial review available under German law was not satisfactory to ensure the full effectiveness of EU law.

Therefore, the Court concluded that, by bypassing the mechanism of preliminary ruling, keystone of the EU legal system, the dispute settlement instrument set forth in the Achmea BIT called into question the principle of mutual trust between Member States (para.58) and had *an adverse effect on the autonomy of EU law* (para. 59).

As soon as it was published in March 2018, the present verdict provoked several debates about the extent of its bearing not only on other intra-EU BITs, but also on the ECT, where this treaty is appealed in intra-EU dispute settlements.[219] Referring to this judgment, for instance, both Germany and Italy, in the above mentioned Vattenfall II and Rockhopper v. Italy cases, requested the arbitral tribunals to dismiss the pending claims based on lack of jurisdiction. It is not possible to cover herein all the points developed within the arbitral decisions; on the whole, the tribunals rejected the deduction of any general rationale from the CJEU judgement that could justifies per se such lack of jurisdiction. The Rockhopper v. Italy tribunal, precisely, stressed two points: the *specific context* of application of the CJEU Judgment, that of art.8 of the Achmea BIT; its limited scope of application, i.e. *only insofar as the EU law is concerned* in the dispute.[220]

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[217] Opinion of the Advocate General Wathelet delivered on 19 September 2017, Case 284/16 Slovak Republic v. Achmea ECLI:EU:C:2017:699 see para 84- 131

[218] In para.45 the Court justifies this finding stating that *it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of Article 8 of the BIT*.

[219] See Laurens Ankersmit, 'Achmea: The Beginning of the End for ISDS in and with Europe?' (*IISD*, 24 April 2018). Available on https://www.iisd.org/itn/2018/04/24/achmea-the-beginning-of-the-end-for-isds-in-and-with-europe-laurens-ankersmit/.

[220] Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic(ICSID Case No. ARB/17/14), Decision on the Intra-EU jurisdictional objection, p. 52-53

The CJEU however has not pronounced itself on the arbitration clause of the ECT (art.26) and on intra-EU disputes triggered under such provision, thus any deduction on this regard is hypothetical.

On this hypothetical line, we can imagine, for instance, combining two aspects of the ECT arbitration clause. First, the formulation of art.26(6) of the ECT - calling the established tribunal to decide according to the *applicable rules and principles of international law* - might be interpreted as including also EU law, or anyway covering fields regulated by the EU legal domain. This was indeed one of the crucial points discussed in both the objections and advocated by Italy and Germany. Second, the ICSID arbitration, to which the provision refers, has a self-contained nature, unlike Stockholm or UNCITRAL arbitration models. In other words, *the ICSID Convention and Arbitration Rules create their own lex arbitri,* thus *national courts have no power to review ICSID awards.*[221] Should the first point, on which a very wide-ranging debate on the "fragmentation of international law"[222] is open, be accepted, a perfect "circularity" in the ECT regime would be admitted with it.

We look forward to seeing how this scenario will evolve.

6. A Look to the Future. ISDSs under the ECT v Climate Change Litigations?

The two big pictures above portray some known and recurrent situations generated by ISDSs. I want now to move to a near-future projection, a desirable one: the realisation in the next decades of an energy transition in line with the ambitious goals set by the EU.

If this situation were to occur, what would happen to the brand-new gas pipelines under construction across Europe?

The studies referred at in the first part show that thinking of their full "green renovation" is very implausible. It is much more realistic, instead, imagining them turning into stranded assets.[223] So, who would bear then the costs of those lost exorbitant investments? And who will decide on it?

In view of the ECT regime currently in force, this could presumably be decided by some arbitral tribunals. Damaged investors would likely engage into ISDSs seeking compensations from States for their sunk costs and lost profits, if stricter climate policies had forced the decommissioning of their business.

[221] Anastasia Simonova, Jus Mundi, Applicable law to the proceeding, available on https://jusmundi.com/en/document/wiki/en-applicable-law-to-the-proceeding; Anna Turinov (n 202), p.9.
[222] Report of the Study Group of the International Law Commission, *The Fragmentation of International Law. Problems caused by the diversification and expansion of International Law*, finalised by Koskenniemi M., UN Doc A/CN4/L.682 (13April 2006).
[223] Note 7

One of the crucial aspects about the ECT denounced by climate activists, is its being "technologically neutral". In other words, it does not differentiate the protection treatment between carbon-intensive and clean investments.

The preamble of the ECT stresses a sort of environmental vocation; it repeatedly refers to environmental protection treaties,[224] including the United Nations Framework Convention on Climate Change. Although non-binding, the collocation of these statements suggests an equal centrality of environment-related issues within the body of the Treaty. On the contrary, environment remains a very marginal issue.[225] Art.19, expressly devoted to "environmental aspects", sets out only additional hortatory principles, such as sustainable development, precautionary measures, the "polluter pays" principle, next to eleven - equally non-binding - practices of conduct. Likewise, the more recent International Energy Charter – a declaration of political intentions issued in 2015 – reaffirms such environmental awareness.[226] The process of modernisation that the ECT is currently undergoing is also declared by the secretary-general as informed to meet the Paris Agreement targets and to *facilitate* such path towards climate neutrality.[227] However, the working-list[228] detected by the contracting parties and some of the draft proposals[229] do not appear adequate to the actual challenges according to many NGOs.[230]

Besides, the ECT investment regime, at least for now, perfectly reflects the prevailing doctrine of the post-Cold War era, geared to strengthen the investor's protection against sovereign actions. The controversial cases referred to above disclose the distortions that this system is liable to engender. The flexibility gained by the clauses of "fair and equitable treatment" or "indirect expropriation",

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[224] "*Having regards also to the Treaty on the Non-Proliferation of Nuclear Weapons, the Nuclear Suppliers Guidelines and other international nuclear non- proliferation obligations or understandings" "Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects; and Recognising the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes*"

[225] Clare Shine, 'Environmental Protection Under the Energy Charter Treaty', *The Energy Charter Treaty. An East-West Gateway for Investment and Trade.* (Kluwer Law International 1996), pp.520 – 545

[226] See the text on https://www.energycharter.org/process/international-energy-charter-2015/overview/#:~:text=The%20International%20Energy%20Charter%20is,binding%20obligation%20or%20financial%20commitment.&text=It%20maps%20out%20common%20principles,in%20the%20field%20of%20energy.

[227] Karel Beckman, Interview: A new Energy Charter Treaty as a complement to the Paris Agreement, on Bordelex, 18 June 2020. Available on: https://www.energycharter.org/fileadmin/DocumentsMedia/Other_Publications/A_new_Energy_Charter_Treaty_as_a_complement_to_the_Paris_Agreement.pdf

[228] Energy Charter Secretariat, Decision of the Energy Charter Conference, (CCDEC 2018 18 STR), Brussels, 27 November 2018. See on https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201818_-_STR_Modernisation_of_the_Energy_Charter_Treaty.pdf

[229] See ClientEarth's legal briefing on the Commission's draft proposal for the modernisation of the Energy Charter Treaty, published on April 2020, available on https://www.documents.clientearth.org/wp-content/uploads/library/2020-04-23-legal-briefing-on-the-commission039s-draft-proposal-for-the-ect-modernisation-ce-en.pdf

[230] Open letter on the Energy Charter Treaty, 9 December 2019, by 278 environmental, climate, consumer, development and trade related civil society groups, and trade unions. Available on: http://foeeurope.org/sites/default/files/eu-us_trade_deal/2019/en-ect-open-letter1.pdf ;

such as to stretch over State's environmental policies, is exemplary of this embedded attitude and of the underlying threat to thwart favourable climate actions.

In light of that and of the great political support that has driven the realisation of those PCIs, the investor's "legitimate expectations" of a longer and profitable business would justifiably be an argument in favour of private investors before the arbitral tribunals.

But regardless, are arbitral tribunals the right fora to decide upon the distribution of costs in the enactment of climate policies, in the first place?

Complementarily to this scenario, one should consider a parallel evolving trend that is drawing attention on an international scale: that of climate change litigations.[231]

An exponentially growing number of NGOs, subnational governments, and individuals are reaching the courts to strengthen climate actions and to ask redress for the costs of climate-related losses and damages.

These litigations can indeed be categorized in two main groups: those claiming the application or amendment of climate policies and brought against governments; and those seeking reparations for harmful climate events, filed against both governments and greenhouse-gas-emitting companies.

The lawsuits targeting "carbon majors" for redress are escalating and, despite the visible difficulties encountered – assessing evidence, establishing causal link and calculating damages - some positive outcomes are slowing emerging. Some Courts have explicitly recognized that private companies can be held in principle liable for climate-related losses and damages.[232] Moreover, the advancement of the *attribution science* – studying the relationship between climate change and its impacts – provides increasing support to these lawsuits.

With regards to the former category, there are very recent and promising developments that are worth mentioning. The ground-breaking judgment of the Dutch Supreme Court in *Urgenda* case,[233] concluded last December, compelled the Netherlands to enforce a more rigorous climate policy in order to reduce greenhouse gas emissions by at least 25% compared to 1990, by the end of 2020. The verdict is significantly built on artt. 2 and 8 of the ECHR, thus sealing climate litigations to the protection of human rights. This decision stands at the end of a long path of striving so as to situate

[231] See the global trends in climate change litigation on two database: Climate Change Laws of the World, maintained by the Sabin Center for Climate Change Law and the Grantham Research Institute on Climate Change and the Environment: https://climate-laws.org/; Climate Change Litigation Databases, maintained by the Sabin Center for Climate Change Law and Porter law firm: http://climatecasechart.com/

[232] Among others, see the *City of Oakland v. BP p.l.c.* (3:17-cv-06011, N.D. Cal.) in 2018; *Lliuya v. RWE AG* (Case No. 2 O 285/15, Essen Regional Court), still pending on appeal at the Higher Regional Court in Hamm (Germany).

[233] Urgenda Foundation v The State of the Netherlands (ECLI:NL:HR:2019:2007, the Hague Supreme Court)

climate change within human rights protection,[234] and it may open a new outlook on the judicial scene.

To conclude, the two prospects – very exemplified herein – of ISDSs on fossil fuel assets and of climate litigations before judicial courts would likely have a great bearing on the future evolvement of climate policies as well as on the distribution of its costs. This fact makes even more urgent an ethical, before than judicial, question about the relationship between these two systems of justice and the role they should be entrusted with in this debate.

[234] John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 Harvard Environmental Law Review 22. The author retraces the first attempts to establish such linkage.

Conclusion

Né qui né altrove ("neither here nor elsewhere") is the slogan of the Movimento No TAP, the social movement gathered in the south of Italy to oppose the realisation of the Trans Adriatic Pipeline. I have so long contemplated these words while elaborating this work that I believe they ended to be full part of it.

This research work in fact has begun with an interest towards that familiar episode occurring next to my hometown and has developed reaching places and people way far from it. While studying the TAP case, I realised that the demands of these citizens were not so different from those coming from several other movements across Europe opposing the building of fossil fuel infrastructures. Likewise, those activists go through similar obstacles to affirm their positions. One of the major barriers they confront is raised by biased channels of information. The general trend to deform public perception about their protests is through a far simplistic and cynical label: that of NYMBY ("Not in My Back Yard") phenomenon. This label is used to characterise the opposition of residents to the realisation of *infrastructures* – without distinctions of any sort - in their area. It points to a selfish motive and to an ill-informed group of people contesting *development plans* – another vague term drawn from the internet and the press – *regardless of whether positive or negative externalities are generated.*

One can imagine the power of such made-up name to mislead information on climate activism. From here is their slogan, recalling those of several other environmental groups. We do not want new fossil fuels routes "*neither here nor elsewhere*".

Far from being localised and isolated, those protests are interconnected and communicate with a wide-raging network of NGOs. The aim of this thesis is exactly that of making visible this connecting line, by approaching the subject from a panoramic viewpoint and exploring the common legal ground.

The first part dwells on the decision-making process at EU level which selects the gas pipelines to be valued as Project of Common Interests (PCI). The second part surveys the international framework protecting investments in energy infrastructures. Besides outlining the legal regimes currently in force, both sections try to frame the historical and political contexts from which they developed. This additional effort has not to be overlooked. On the one hand, it wants to give sense

of the background ideologies motivating certain legal constructions; on the other hand, it wants to stress their contingent nature.

The first section focuses on the Third Energy Package and the TEN-E regulation. The former establishes the European Network of Transmission System Operators for Gas (ENTSOG), while the latter defines the PCI selection process. The central position possessed by the ENTSOG in this proceeding is to read within the rationales driving the development of the European energy policies since the 90s. First, the attempt to unbundle vertically integrated monopolies governing Member States' energy markets; second, the endeavour to open those national markets to a single European dimension available to new actors and financial investors. Throughout the analysis, several shortcomings of the PCIs regulation have been also pointed out. Beneath a surface of procedural drawbacks, the most concerning issue denounced by NGOs is of a systemic nature. The very presence of transmission system operators' companies in the selection of PCI has raised serious doubts of legitimacy. Those corporations are indeed the direct beneficiaries of very large subsidies and loans from public funding programmes. Moreover, even accounting for their presence as stakeholders (according to art.11 TEU), their permeating role in the proceeding is not balanced by an equal representation of the countervailing interests at stake. Local communities and municipalities, whose territory is directly involved in the building works, as well as environmental NGOs participate by means of consultations, which have a far less bearing on the final outcomes - as we saw from the data.

The core subject of the second section is the Energy Charter Treaty (ECT). This treaty perfectly embodies the post-Cold War attitude providing for the most comprehensive protection regime for foreign investments. Also for this reason, the ECT is the most-invoked treaty in investor-State dispute settlements (ISDS). Still today as in the past, such disputes remain a very debated issue. Besides general criticisms on their one-sidedness and lack of transparency, two contentious aspects are more closely emphasised herein: the regulatory chill and the dubious relationship of intra-EU arbitral disputes with the European judicial system. Both points resurface the accusation widely expressed by climate activists against the ECT of thwarting climate mitigation targets.

Seen in the whole, the two outlined legal frameworks appear to be in continuity. The European energy policy as well as the ECT draw on a similar underpinning rationale, that of prompting the liberalisation of the energy market. With this purpose, market actors and private property interests are placed at the centre of both legal constructions: upstream, in the legislative procedure designing the infrastructural development plan; and downstream, in the legal framework enforcing it.

Combining these two ends the overall structure is seemingly circular and locked-in. Private property interests get a privileged entry in the law-making process, and their enforcement, on the other end, is secured by a one-sided system of international arbitration.

In view of this, which kind of space is left to climate activists demands to stop funding new fossil fuel routes? Contemplating the 4th PCIs list released last October by the Commission and containing something like 32 gas infrastructures, a quite narrow space.

However, the current state of affairs may be subject to changes very soon and on different sides.

First of all, the European Ombudsman has launched in February an inquiry against the European Commission into the *alleged failure to carry out a sustainability/climate assessment for all existing fossil fuel projects on the list of Projects of Common Interest.* Secondly, the European Commission has opened on May the consultation procedure to review the TEN-E regulation in accordance with the commitment previously expressed in the European Green Deal. Thirdly, the ECT is under a process of modernisation among the signatory parties.

We hope that these ongoing procedures could address the several warnings made by NGOs and social movements and adjust the legal framework in a way consistent with the respect of human rights and democratic principles. This would mean assuring the overall framework not to be locked in a self-referential and one-sided system of values.

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Annexes

AGREEMENT AMONG THE REPUBLIC OF ALBANIA, THE HELLENIC REPUBLIC AND THE ITALIAN REPUBLIC

RELATING TO

THE TRANS ADRIATIC PIPELINE PROJECT

PREAMBLE

The Republic of Albania, the Hellenic Republic and the Italian Republic (hereinafter referred to as "the **Parties"** or, individually, as "the **Party"**) represented by their respective governments,

(1) in furtherance of the principles set forth in international trade and investment agreements applicable to each Party, including the Energy Charter Treaty, the Community Treaties and the Energy Community Treaty, and the need to further expand and implement co-operation among the Parties in the energy sector;

(2) in an effort to further promote mutually beneficial cooperation in ensuring the reliable supply of natural gas from sources in Central Asia and the Middle East, including from the Republic of Azerbaijan, to the European Union via the Republic of Turkey;

(3) understanding that Trans Adriatic Pipeline AG wishes to construct and operate a cross-border interconnector pipeline originating in the Hellenic Republic at the Greek-Turkish border and designed to transport Natural Gas through the Hellenic Republic to the Italian Republic via the Republic of Albania;

(4) acknowledging that the development and interconnection (pursuant to the Interconnection Agreements relating to this Project) of the Trans-Anatolian Natural Gas Pipeline System and of the natural gas transport systems of the Parties to the Trans Adriatic Pipeline will enhance the security and availability of natural gas supply as a result of the diversification of routes and sources of supply of natural gas to the European Union;

(5) recognising the important strategic and integral role that the Trans Adriatic Pipeline will fulfil in opening the Southern Gas Corridor and referring to the designation by the European Union's Trans-European Networks – Energy program of the Trans Adriatic Pipeline as a southern corridor (natural gas route 3) pipeline;

(6) acknowledging that any Host Government Agreement entered into by a Party may be ratified by its national Parliament either after or concurrently with the ratification of this Agreement by its national Parliament;

(7) acknowledging that the European Commission has been apprised of the negotiations of this Agreement and the intentions of the Parties in relation to its execution; and

(8) with a view to creating uniform and non-discriminatory conditions and standards for the planning, construction and operation of the Trans Adriatic Pipeline in accordance with the domestic legislation of the Parties and bilateral and multilateral international agreements and treaties applicable to each Party;

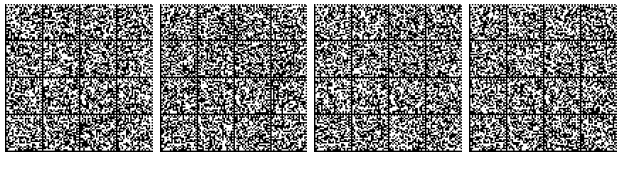
(9) having in mind the Memorandum of Understanding between the Government of the Hellenic Republic the Council of Ministers of the Republic of Albania and the Government of the Italian Republic on cooperation in relation to the Trans Adriatic Pipeline Project signed in New York on 27 September 2012;

AGREE AS FOLLOWS:

ARTICLE 1

DEFINITIONS

Capitalised terms used in this Agreement (including the Preamble) have the meanings given to them in the Appendix to this Agreement.



ARTICLE 2

PROJECT SUPPORT AND COOPERATION

1. The Parties will facilitate, enable, and support the implementation of the Project and to co-operate and co-ordinate with each other in that respect and shall provide stable, transparent and non-discriminatory conditions for the implementation and execution of the Project.

2. The Parties agree that Transport shall be performed in accordance with the provisions of this Agreement and the applicable legislation under the Community Treaties and the Energy Community Treaty relating to the same, and without imposing any unreasonable delays, restrictions or charges.

ARTICLE 3

RELATIONSHIP WITH LAWS AND TREATIES

1. No provision of this Agreement shall require:

(a) the Hellenic Republic or the Italian Republic to derogate from any mandatory requirement under the Community Treaties; or

(b) the Republic of Albania to derogate from any mandatory requirement under the Energy Community Treaty.

2. The Project Participants shall be regarded as "Investors" for the purposes of article 1(7) of the Energy Charter Treaty and the Project and all aspects of it, and any interest they may have under any agreement relating to the Project, shall be each regarded as an "Investment" into the Territory of the relevant Party for the purposes of article 1(6) of the Energy Charter Treaty.

ARTICLE 4

AUTHORISED ENTITIES

1. Each Party appoints the following Persons to send and receive communications and notices from the other Parties in relation to this Agreement and to act as coordinator of that Party's rights and obligations under this Agreement:

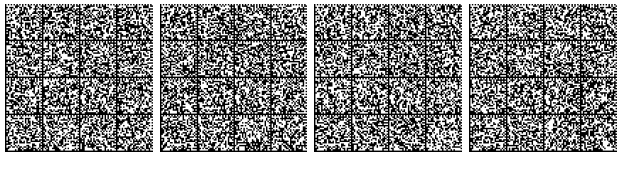
(a) for the Republic of Albania, the General Standard Directorate in the Ministry of Economy, Trade and Energy,

(b) for the Hellenic Republic, the B' General Directorate for Economic Relations of the Ministry of Foreign Affairs, and

(c) for the Republic of Italy, the Department of energy - Directorate General for Security of Supply and Energy infrastructures of the Ministry of Economic Development

(each, an "**Authorised Entity**" and collectively, the "**Authorised Entities**").

2. Each Party may designate additional or replacement Persons to act as its Authorised Entities for purposes of this Agreement by providing notice of the same to each other Party.



ARTICLE 5

HOST GOVERNMENT AGREEMENTS

1. The Republic of Albania and the Hellenic Republic, being the Parties in whose Territories the majority of the Trans Adriatic Pipeline will be located, acting through their respective Host Governments, have each entered, or will each enter, into a Host Government Agreement with the Project Investor, in compliance with the relevant mandatory requirements referred to in Article 3(1) above and which include, without limitation, provisions on the Taxes (including Tax rates) which will apply to the Project Investor in the jurisdiction of each of those Parties. Each Host Government Agreement shall be ratified by national law of the relevant Party.

2. Each Host Government Agreement which a Party enters into:

(a) is deemed to have been or shall be entered into by virtue of and in furtherance of and elaboration of this Agreement; and

(b) shall be the Law that implements that Party's obligations, agreements and undertakings under or in connection with this Agreement, and no common/ordinary Law of that Party (including the interpretation and application procedures thereof) that is contrary to, or inconsistent with, the terms of that Host Government Agreement shall limit, abridge or affect adversely the rights granted under that Host Government Agreement to the Project Investor or any other Project Participant or otherwise amend, repeal or take precedence over the whole or any part of that Host Government Agreement.

ARTICLE 6

AUTHORISATIONS

Each Party recognises the strategic national importance to that Party of the Project and accordingly shall take all measures to facilitate the fulfilment of the Project in its territory, including the granting of all Authorisations required for the implementation of the Project and the conduct of the Project in accordance with the Laws of the relevant Party without unreasonable delays or restrictions.

ARTICLE 7

NON-INTERRUPTION OF THE PROJECT

1. No Party shall, except through a competent authority pursuant to EU Regulation 994/2010, on Security of Gas Supply (the **Gas Supply Regulation**) interrupt, curtail, delay or otherwise impede the (forward and/or reverse) flow of Natural Gas through the Trans Adriatic Pipeline.

2. If any event occurs or any situation arises which gives reasonable grounds to believe that a threat to interrupt, curtail or otherwise impede any aspect of the Project (other than the flow of Natural Gas through the Trans Adriatic Pipeline) exists, the Party in respect of whose territory the relevant threat has arisen, shall use all lawful and reasonable endeavours to eliminate that threat

3. If any event occurs or any situation arises which interrupts, curtails, or otherwise impedes any aspect of the Project, the Party in respect of whose territory the relevant event or situation has arisen shall immediately give notice to the other Parties and the Project Investor of the event or situation, give reasonably full details of the reasons for the event or situation and (except in the case of interruption, curtailment or impeding of the flow of Natural Gas through the Trans Adriatic Pipeline) shall use all lawful and reasonable endeavours to eliminate the event or situation and shall promote restoration of the affected aspect of the Project at the earliest possible opportunity.

ARTICLE 8

CONSISTENT PROJECT STANDARDS

The Parties acknowledge that in light of the cross border nature of the Project, it is essential that a coordinated and uniform set of standards apply to the whole of the Project, including in relation to technical, safety, environmental, social, community and labour standards and that the establishment between the Parties of those coordinated and uniform standards will be one of the responsibilities of the Implementation Commission contemplated by Article 10 of this Agreement.

ARTICLE 9

TAXES

For the determination of the tax assessment basis of the Project Investor, the provisions of the national legislation shall apply based on the principles of the Organisation for Economic Cooperation and Development. For revenues and costs of the Project Investor, uniform and appropriate allocation keys consistent with the clauses of the Double Tax Treaties relating to determination of business profits shall be set out in legally binding advance pricing agreements made between the tax authorities of each of the Parties among each other and with the tax authority of the Swiss Confederation (being the jurisdiction of incorporation of the Project Investor). The advance pricing agreements shall have a duration of a minimum of 25 years and will not be capable of being amended or terminated without the consent of the Project Investor. The allocation keys agreed by a Party set out in any advance pricing agreement shall also be reflected in the Host Government Agreement to which that Party is a party.

ARTICLE 10

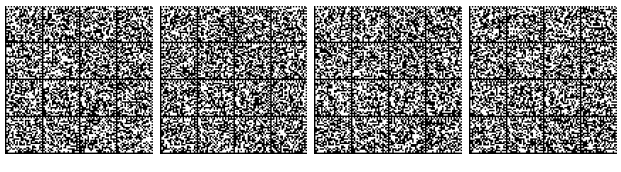
IMPLEMENTATION COMMISSION

An Implementation Commission is hereby established consisting of two duly authorised representatives from each Party (the **Implementation Commission**). The Implementation Commission shall oversee compliance with this Agreement, work with the Project Investor to agree on a Protocol to be concluded by the Parties establishing a set of consistent and uniform standards referred to in article 8, to apply to the whole Project and shall take such other actions as it may, by consensus of its members, deem to be necessary to facilitate the implementation of this Agreement. The Project Investor shall be entitled to appoint one observer to the Implementation Commission, who may attend the meetings and other activities of the Implementation Commission. The Implementation Commission shall be an advisory body only and shall not be empowered to make final and binding decisions on behalf of the Parties, including in relation to the resolution of disputes under this Agreement.

ARTICLE 11

RESPONSIBILITY

Any failure of, or refusal by, a Party to fulfil or perform its obligations. take all actions and grant all rights and benefits as provided for by this Agreement shall constitute a breach of such Party's obligations under this Agreement. The responsibility of a Party under this Article shall. in accordance with the general principles of international law. extend to the acts and omissions of any State Authority or State Entity.



ARTICLE 12

AMENDMENTS AND TERMINATION

No Party shall amend, or otherwise seek to avoid or limit this Agreement without the prior written consent of each of the other Parties. Any amendments to this Agreement shall be adopted by all the Parties in writing and shall enter into force in accordance with the procedure prescribed in article 14 of the present Agreement. This Agreement shall remain in full force and effect until the date of completion of the decommissioning of the entire Trans Adriatic Pipeline. No party may denounce or withdraw from this Agreement or suspend the performance of its obligations under this Agreement without the prior consent of each of the other Parties. However, if the Trans Adriatic Pipeline is not selected by the Shah Deniz Consortium to transport natural gas from the Caspian Region to Europe, TAP shall identify, in agreement with the Parties and within a period of 24 months from the entry into force of this Agreement, alternative sources of supply. Failing this, a Party may withdraw from the Agreement by sending a three months prior written notice to the other Parties through diplomatic channels.

ARTICLE 13

DISPUTE RESOLUTION

Disputes relating to the interpretation or the implementation of this Agreement shall be settled by diplomatic means.

ARTICLE 14

ENTRY INTO FORCE

This Agreement shall enter into force on the date that the respective national instruments of ratification have been exchanged by all the Parties (the Effective Date). Upon ratification, each Party shall take the necessary legal measures to implement the provisions of this Agreement. This Agreement has been made in three original copies in the English language.

Done this 13th day of February 2013 at Athens, Greece.

FOR THE REPUBLIC OF ALBANIA

FOR THE HELLENIC REPUBLIC

FOR THE ITALIAN REPUBLIC

MINISTERO DEGLI AFFARI ESTERI

PER ORDINE DEL MINISTRO
Il Capo Ufficio Legislativo
Cons. Amb. Stefano Soliman

APPENDIX

DEFINED TERMS

Affiliate means, with respect to any Entity, any other Person that, directly or indirectly through one or more intermediaries, controls, is controlled by or is under common control with that Entity. For purposes of this definition, "**control**" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an Entity, whether through the ownership of a majority or other controlling interest in the voting securities, equity or other ownership interest in an Entity, by law, or by agreement between Persons conferring such power or voting rights.

Agreement means this intergovernmental agreement, including any Appendices attached hereto, as amended, supplemented or otherwise modified from time to time.

Authorisation means any authorisation, consent, concession, license, permit or other form of approval, by or with any Party or State Authority whether held or to be held in the name of any Project Participant relating to or in connection with any activity relating to the Project.

Community Treaties means the Treaty Establishing the European Community (the Treaty of Rome, as amended by the Treaty of Amsterdam, and the Treaty of Nice), the Treaty of Maastricht (as amended by the Treaty of Amsterdam and the Treaty of Nice) and the Treaty establishing the European Atomic Energy Community, and in so far as those Treaties are replaced and succeeded by the Treaty of Lisbon, that is, the Treaty of European Union and the Treaty on the Functioning of the European Union.

Constitution means, with respect to any Party, the constitution of that Party, as the same may be amended or otherwise modified or replaced from time to time.

Contractor means any Person supplying directly or indirectly, whether by contract, subcontract or otherwise, goods, work, technology or services, including financial services (including inter alia, credit, financing, insurance or other financial accommodations) to the Project Investor or its Affiliates in connection with the Project to an annual contractual value of at least EUR 100,000, excluding, however, any individual acting in his or her role as an employee of any other Person.

Effective Date has the meaning given to it in Article 14.

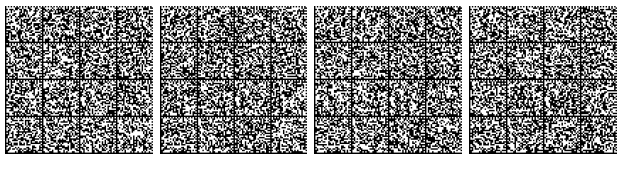
Energy Charter Treaty means the Energy Charter Treaty as opened for signature in Lisbon on 17 December 1994 and in force as of 16 April 1998.

Energy Community Treaty means the Energy Community Treaty as opened for signature in Athens on 25 October 2005 and in force as of 1st July 2006.

Entity means any company, corporation, limited liability company, joint stock company, partnership, limited partnership, joint venture, unincorporated joint venture, association, trust or other juridical entity, organisation or enterprise duly organised by treaty or under the laws of any state or any subdivision thereof.

Gas Seller means any Person that is a seller of Natural Gas at the point where the Trans Adriatic Pipeline interconnects with the national Natural Gas transmission or distribution network of a Party.

Host Government means the central or federal government of a Party.



Host Government Agreements means agreements entered, or to be entered, into between:

1. the Host Government of the Hellenic Republic (on behalf of the Hellenic Republic) and the Project Investor; and

2. the Host Government of the Republic of Albania (on behalf of the Republic of Albania) and the Project Investor.

Implementing Act means, in relation to any Party, any Law or Authorisation of that Party or any State Authority of that Party, or any Host Government Agreement or Project Agreement, confirming and detailing the rights and commitments set out in this Agreement.

Insurer means any insurance company or other Person authorised to provide and providing insurance cover (including re-insurance cover) for all or a portion of the risks in respect of the Trans Adriatic Pipeline and/or the Project, and any successors or permitted assignees of such insurance company or Person.

Interconnection Agreement means an agreement between a Project Participant and any Party, State Entity or State Authority or Trans Anatolian Gas Pipeline relating to the interconnection of the Trans Adriatic Pipeline, Trans Anatolian Gas Pipeline and the national Natural Gas transmission or distribution network of a Party.

Law means the laws of a Party binding and legally in effect from time to time, including the Constitution of that Party, all other laws, codes, decrees, by-laws, regulations, communiqués, declarations, principle decisions, orders, normative acts and policies, all international agreements to which that Party is party together with all domestic enactments, laws and decrees for ratification or implementation of such international agreements, and prevailing judicial interpretations of all such legal instruments.

Lender means any financial institution (including commercial banks, multilateral lending agencies, bondholders, guarantors (other than Shareholders) and export credit agencies) or other Person providing any indebtedness, loan, financial accommodation, extension of credit or other financing to the Project Investor in connection with the Trans Adriatic Pipeline (including any refinancing thereof), and any successor or permitted assignee of any such financial institution or other Person.

Natural Gas means hydrocarbons that are extracted from the subsoil in their natural state and are gaseous at normal temperature and pressure.

Person means any natural person or Entity.

Project means the evaluation, development, design, construction, installation, financing, refinancing, ownership, operation (including the Transport of Natural Gas through the Trans Adriatic Pipeline), repair, replacement, refurbishment, maintenance, expansion, extension (including laterals) and, at the relevant time, decommissioning of the Trans Adriatic Pipeline.

Project Agreement means any agreement, contract, license, concession or other document, other than this Agreement and any Host Government Agreement, to which, on the one hand, a Party, any State Authority or State Entity and, on the other hand, any Project Participant are or later become a party relating to the Project, including any Interconnection Agreement, as any such agreement, contract or other document may be extended, renewed, replaced, amended or otherwise modified from time to time in accordance with its terms.

Project Investor means Trans Adriatic Pipeline AG, a company organised under the laws of the Swiss Confederation.

Project Participants means the Project Investor, the Shareholders, the Shippers, the Contractors, the Lenders and the Gas Sellers.

Shareholder means, at any time, any Person holding any form of direct or indirect equity or other ownership interest in the Project Investor, together with any Affiliate, successors and permitted assignees of that Person.

Shipper means any Person which has a legal entitlement (whether arising by virtue of any contract or otherwise) to Transport Natural Gas through all or any portion of the Trans Adriatic Pipeline.

State Authority means, in relation to any Party, the central or federal government of that Party and any and all central, federal, regional, municipal, local and provincial authorities or bodies (but for the avoidance of doubt shall exclude any independent authority) of that Party and any constituent element of any of the foregoing.

State Entity means any Entity in which, directly or indirectly, a Party has a controlling equity or ownership interest or similar economic interest, or which that Party directly or indirectly controls. For purposes of this definition, "**control**" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an Entity, whether through the ownership of a majority or other controlling interest in the voting securities, equity or other ownership interest in an Entity, by law, or by agreement between Persons conferring such power or voting rights.

Taxes means all existing and future levies, duties, customs, imposts, payments, fees, penalties, assessments, taxes (including VAT or sales taxes), charges and contributions payable to or imposed by a state, any organ or any subdivision of a state, whether central or local, or any other body having the effective power to levy any such charges within the territory of a state, and Tax shall mean any one of them and Taxation shall be construed accordingly.

Trans Adriatic Pipeline means the Natural Gas pipeline system intended to run from the Hellenic Republic at the Greek –Turkish border via the Republic of Albania to the vicinity of Lecce in the Italian Republic, including all the physical assets associated with that pipeline system, including all plant, equipment, machines, pipelines, tanks, compressor stations, fibre optic cables and other ancillary physical assets.

Transport means carriage, shipping or other transportation of Natural Gas, via any legal arrangement whatsoever.