

The European Green Deal, Climate Law and Arbitration:

A Primer

The European Commission presented a communication entitled “The European Green Deal” on 11 December 2019¹, the day before the European Council endorsed “the objective of achieving a climate-neutral EU by 2050, in line with the objectives of the Paris Agreement”² and announced new Nationally Determined Contributions (“NDCs”) pursuant to the Paris Agreement to that effect.³ A “roadmap for making the EU’s economy sustainable by turning climate and environmental challenges into opportunities across all policy areas and making the transition just and inclusive for all”⁴, the “Green Deal” is both an anticipated announcement of these new NDCs and a prefiguration of the Eighth environmental action programme.

The Green Deal describes itself as a “new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use” as much as at meeting traditional environment and health concerns. At the same time, “this transition must be just and inclusive.” The Union would transform its economy and society “to put it on a more sustainable path”, a “new path of sustainable and inclusive growth.” The Green Deal is part of the strategy to implement the UN 2030 Agenda and Sustainable Development Goals (“SDGs”).⁵ To that end, the EU must “rethink policies” for clean energy supply across the economy, industry, production and consumption, large-scale infrastructure, transport, food and agriculture, construction, taxation and social benefits, which may require delicate “potential trade-offs between economic, environmental and social objectives.”

The European Green Deal project comes just a few months after ICC issued a report of its Taskforce on Arbitration of Climate Change-related Disputes entitled “Resolving Climate Change Related Disputes through Arbitration and ADR.”⁶ As shown in that Report, the many sectorial transitions that must take place in the next future will result in a flow of investments and contracts of the most diverse natures and involving potentially any business operator that will in turn face potentially unheard of situations and result in disputes which arbitration, as well as other ADRs, are in a unique position to address in an efficient manner.

As support for these ambitious claims, the communication comes with a list of “key policies and measures”, a long series of initiatives, many of a legislative nature, that the Commission contemplates launching in 2020-2021.⁷ While the most widely noticed one is a proposal for a “first European ‘Climate Law’” that would “enshrine the 2050 climate neutrality objective in legislation”, others would range from the strengthening of current climate legislation and the adoption of “a new, more ambitious EU strategy on adaptation to climate change”⁸ to new steps in the regulation of industrial activities, in the protection of biodiversity, or in the greening of the agricultural policy.⁹ From a legal standpoint, the expected public and private actions with respect to climate (I.), the environment and economics (II.), are prone to result in a development of a steady arbitration practice (III.).

I. Climate, the main target: towards “carbon neutrality by 2050”

The single most significant working project of the Green Deal is “[i]ncreasing the EU’s climate ambition for 2030 and 2050.”¹⁰ The panel of measures contemplated from that single point of view is quite diverse. It encompasses the “first European Climate law” (A), already implemented climate legislation is to be revised (B) as well as, way beyond those, the relevant legislation with respect to buildings and transportation (C), among others.

A - The “first European ‘Climate Law”

The “first European ‘Climate Law””, which is at the heart of the Green Deal, is supposed to make carbon neutrality by 2050 legally binding and ensure that “all EU policies contribute to the climate neutrality objective and that all sectors play their part.”¹¹ As a matter of fact, the Paris Agreement already contemplates “[...] to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century [...]”¹² For the EU, one of the most advanced economies with a strong historic responsibility in the climate area, carbon neutrality by 2050 is thus nothing more than strict compliance with the Paris Agreement.

The Commission indeed presented on 4 March 2020 a proposal for a regulation¹³ setting out “a binding objective of climate neutrality in the Union by 2050 in pursuit of the long-term temperature goal” of the Paris Agreement, as well as “a framework for achieving progress in pursuit of the global adaptation goal”. The EU institutions and the Member States would be required to take, each at its level, the measures necessary “to enable the collective achievement” of that objective, “taking into account the importance of promoting fairness and solidarity among Member States.” To secure the implementation of that unindividualized objective, the “European Climate Law” would rely on the Governance of the Energy Union mechanism that has been laid down for similar purposes under existing legislation.¹⁴

B - Revision of environment and energy legislation implementing the Paris Agreement

As the “first” climate law is obviously not such, the Green Deal also announces that the bulk of European climate law will be revised, starting with the Emissions Trading System (ETS)¹⁵ “including a possible extension [...] to new sectors”! Sectors beyond the scope of the ETS are next in the Commission’s resolve to “review and propose to revise where necessary” other legislations, i.e., national targets to reduce emissions¹⁶ and the “LULUCF” Regulation on land use, land use change and forestry¹⁷, two main components of the legislative package derived from the 2016 “Accelerating Europe’s transition to a low-carbon economy” action plan.¹⁸

The Green Deal also aims at the three directives derived from the other 2016 action plan, “Clean Energy for All Europeans”¹⁹, i.e. those on the promotion of the use of energy from renewable sources²⁰, on the energy performance of buildings²¹ and on energy efficiency.²² The Commission will assess the need for additional measures upon its review of the Member States’ energy and climate plans pursuant to the Governance of the Energy Union mechanism.

C - Construction and mobilities

With respect to construction, besides the strict application of the legislation on energy performance of buildings, the Green Deal discusses several possibilities such as including them in the ETS, incentives to renovation of existing buildings, and the lifting of national regulatory barriers to renovation.

As to the transport sector, the Commission considers that a decrease of 90 % of its emissions “is needed by 2050”, to which end it will propose a « strategy for sustainable and smart mobility.” It furthermore intends to put an end to fossil-fuel subsidies, to review tax exemptions for aviation and maritime fuels and to consider such moves as the extension of ETS to the maritime and road transport sectors, the decrease of ETS allowances allocated for free to airlines, and “effective road pricing.”

II. Difficult balances of interests: climate, environment and economics

While climate change action thus takes precedence in the *Green Deal* over more classical aspects of the environment – it is *Green* before and above all - (A), it does not and could not ignore economic and social dimension considerations – it is also a *Deal* - (B).

A - *The Green Deal and the environment*

The environment, as opposed to climate, is covered in the Green Deal on three main grounds as likely to result in potentially litigious situations: circular economy, biodiversity, and pollution.

Circular economy is, more than ever, an objective of the EU’s environment policy, however indefinite may be some of the Green Deal’s contemplated projects : “an EU industrial strategy to address the twin challenge of the green and the digital transformation”, a new “circular economy action plan” which includes “a ‘sustainable products’ policy”, etc. In a somewhat more concrete way, there should be a boost in extended producers’ responsibility (i.e., with respect to their products’ end-of-life) as well as measures aimed at resource-intensive products such as textiles, construction, electronics and plastics. Among the many other projects considered, all packaging should be reusable or recyclable by 2030, with a regulatory framework for biodegradable et bio-based plastics.²³

The Commission presents a “strategy” on *biodiversity* in anticipation of the Conference of the Parties to the Convention on Biological Diversity due to take place in Kunming, China, in October 2020. Specific measures could be adopted, including quantified objectives, such as the extension of the Natura 2000 network, as well as the improvement and the restoration of the zones included. That crucial aspect of the environment policy is part of climate action: measures will be taken to improve and restore damaged ecosystems’ ecological status “including carbon-rich ecosystems”; a new “EU forest strategy” will contribute to effective afforestation, and forest preservation and restoration “to help to increase the absorption of CO₂”, and a “sustainable ‘blue economy’” will play a central role in tackling climate change.²⁴

The Green Deal would finally aim at a *zero pollution* “ambition for a toxic-free environment.” The Commission foresees adopting a zero-pollution action plan for air, water and soil. Current air quality legislation would be strengthened, that on large industrial installations extended and strengthened. A “chemicals strategy for sustainability” is contemplated, as well as simplifying and strengthening the legal framework and a “one substance – one assessment” approach.²⁵

B - *The Green Deal: looking for economic meaning and social acceptability*

While thus being rich in prospects on climate and the environment, the Green Deal does not ignore tensions between objectives of economic and social natures, on the one hand, and of environmental and climate inspiration, on the one hand. The Commission believes that the climate-oriented policy reforms will help to ensure effective carbon pricing throughout the economy, thus encouraging changes in behaviour. Ensuring that taxation is “aligned with climate objectives is also essential”, especially energy taxation.²⁶

The Green Deal would tackle frontally the “risk of carbon leakage” linked to the difference in the ambition levels of the Union and its partners now enshrined in international economies by their inability to harmonize their policies in the Paris Agreement. The guidelines on certain State aid measures in the context of the system for greenhouse gas emission allowance trading will be revised.²⁷ A carbon border adjustment mechanism for selected sectors would be “designed to comply with” WTO rules and “other international obligations of the EU.”²⁸

While achieving the current 2030 climate and energy targets could require €260 billion of additional annual investment, the Green Deal announces a “Sustainable Europe Investment Plan” and the Commission has proposed a 25% target for “climate mainstreaming across all EU programmes.” The EU budget would benefit from new revenue streams based on a tax on non-recycled plastic-packaging waste and an allocation of 20% of the revenue from the auctioning of ETS to the EU budget.²⁹ The Member States will not easily accept such a “declaration of independence” of the European environment policy.

The transitions needed must be conducted in a fair and inclusive way and the Green Deal plan on a “Sustainable Europe Investment Plan”, including a Just Transition Mechanism relying on a “Just Transition Fund” that would focus on the regions and sectors that are most affected by the transition. Support would be “linked to promoting a transition towards low-carbon and climate-resilient activities” by providing access to “re-skilling programmes, jobs in new economic sectors, or energy-efficient housing.”

Finally, the private sector should contribute to financing green transition with a “renewed sustainable finance strategy.” The corporate governance framework should focus less on short-term financial performance than on their long-term development and sustainability. Climate and environmental risks would be managed and integrated into the financial system.

Thus, in every respect, for the European Green Deal to acquire a true significance, the EU institutions must see to the balancing between diverging objectives in an economic, political and institutional context. No matter what the outcome may be in terms of actual actions, business investors and operators will have to adapt, and many look forward to proactive involvement. This in turn will result in legal situations calling for dispute resolution.

III. Arbitration, the European Green Deal and Climate Law

Arbitration has been used as a forum to resolve international disputes since well before climate change became a known concern, and even before the environment in its modern conception started to be a subject-matter of disputes. Environmental, energy, and even lately climate-related, disputes have been submitted to, and resolved through, arbitration.

On the institutional front, the Permanent Court of Arbitration (“PCA”) issued “Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment” (the “PCA Environmental Rules”) in 2001³⁰, which rules apply indifferently to both types of arbitration. As to ICC, the above-mentioned recent Report of its Taskforce on Arbitration of Climate Change-related Disputes concludes that that institution’s dispute resolution procedures, including its Arbitration Rules, are fit for the purpose of resolving all such disputes.³¹

A – Arbitration of environment-related disputes: a steady practice

ICC awards with some environmental aspects have been reported for over thirty years, about half of which dealt with warranty agreements in corporate acquisitions and sales of contaminated sites.³² In these cases, arbitral tribunals are clearly entrusted not with the task

of safeguarding the environment, but of settling issues such as the existence of site contamination and resulting environmental damage, its “imputability” to the current or former operator, and the extent and costs of remediation. Other reported arbitrations concerned construction and infrastructure projects, such as solar parks, wind farms, hydroelectricity installations. Some have as their subject-matter prospection, extraction, transportation, storage and distribution of natural resources, sometimes with the disruption of administrative orders, not unlike state measures in investment arbitration. Many such contract disputes involve long-term prospection and/or extraction rights, e.g. in the oil and gas industry, which are prone to being questioned in the wake of climate-mandated transitions and are mainly granted by States or state entities, a factor that somewhat blurs the distinction between commercial arbitration and the Investor-State dispute resolution system (“ISDS”), another arbitration practice where environmental issues have been raised and resolved for decades.³³

The nexus between commercial arbitration and the general interest in environmental and climate-related disputes was highlighted in a case where it was determined that an award did not constitute a State aid under competition rules.³⁴ The price of electricity upon renewal of a power supply contract having been fixed in arbitration, it was found that there was no advantage to the seller – one of the requisites for there to exist a State aid – because a prudent private market operator, placed in a similar situation as the purchaser, a State entity, would have acted in the same way when agreeing to such an arbitration clause. Thus, commercial arbitration provides an acceptable response to public interest concerns.

B. Climate change-related disputes: new horizons for commercial arbitration

The above-mentioned ICC Task-force estimates that “required rapid and far-reaching transition to energy, land, urban and infrastructure and industrial systems arising out of a global response to climate change will necessarily give rise to new investment and contracts, and accordingly contractual and other legal disputes.”³⁵ Climate change-related arbitration may arise out of or in relation to contracts relating to mitigation of greenhouse gas emissions (such as transactions on emission allowances), adaptation, or more generally the implementation of energy, land, urban and infrastructure or systems transition, including the already numerous commercial disputes over the supply, erection and/or operation of renewable energy facilities (wind, solar, hydro...), the decommissioning of non-renewable power plants, the renovation of existing buildings and infrastructure, etc. Contracts without any specific climate-related purpose or subject-matter may give rise to disputes involving climate or related environmental issues as they may be impacted by the contracting parties’ responses to changes in national laws, regulation or policy, voluntary commitments or, even more broadly, environmental impacts of climate change and/or responses to associated climate change action in national courts and other fora. Arbitration may even conceivably be initiated by an affected non-party individual or group of individuals on the basis of a “submission agreement” (*compromis*) concluded with a business operator or of an unilateral offer to arbitrate included in its code of conduct, ethical standards, or corporate governance model in order to resolve existing climate change or related environmental disputes, e.g. groups or populations impacted by an investment in new or protected forestry areas, impacting their livelihoods and access to natural resources of resident populations or the establishment of a wind farm or solar power panel installation, affecting arable land or fisheries.³⁶

In climate change-related disputes as in other ones, whether before arbitral tribunals or in other jurisdictional forums, be they state, regional or international, claimants may seek injunctive as well as compensatory relief. However, due to the specificities of the climate change phenomenon, the pre-requisites for compensatory relief may not be met since issues such as *locus standi*, existence of a cause of action, “imputability” or causation would have to be assessed by arbitral tribunals under applicable rules, like they would if brought in a state or other court. These issues depend mainly on substantive as well as evidentiary

considerations which arbitral tribunals address in quite similar a way as courts do so. By comparison, the conditions for injunctive relief may, at least in appropriate circumstances, be easier to fulfil. Such considerations depend primarily on the law applicable to the dispute and are not specific to arbitration, whether “investment” or “commercial.”

The prospects of arbitration for resolving such types of disputes may depend on its “social acceptability”, and ICC has been attempting to improve its public perception by allowing some level of third-party involvement in what is otherwise a private process, through *amici curiae* and by increasing transparency of arbitral proceedings, including in the publication of submissions, procedural decisions and hearings and publishing awards.

Further readings:

A European Green Deal: Striving to be the first climate-neutral continent -
https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en

Communication COM(2019) 640 final of 11 December 2019, “The European Green Deal”,
COM(2019) 640 final: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588580774040&uri=CELEX:52019DC0640>

Proposal for a Regulation establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), COM(2020) 80 final, 2020/0036 (COD): <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1588581905912&uri=CELEX:52020PC0080>

ICC, “*Resolving Climate Change Related Disputes through Arbitration and ADR*”, Report of the ICC Task Force on Arbitration of Climate Change Related Disputes:
<https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>

Patrick Thieffry, *Arbitrage et droit européen de l’environnement*, *Rev. Arb.*, n° 4/2019, page 1069.

Patrick Thieffry, *HANDBOOK OF EUROPEAN ENVIRONMENTAL LAW*, Bruylant, 2018, 392 pages.

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- ¹ Communication COM(2019) 640 final of 11 December 2019, “The European Green Deal”, COM(2019) 640 final.
- ² Conclusions of the meeting of the European Council of 12 December 2019, EUCO 29/19.
- ³ Council of the European Union, “Long-term low greenhouse gas emission development strategy of the European Union and its Member States – Submission to the UNFCCC on behalf of the European Union and its Member States”, 5 March 2020, n° 6612/20.
- ⁴ IP/19/6691.
- ⁵ See, Resolution adopted by the United Nations General Assembly on 25 September 2015 “Transforming our world: the 2030 Agenda for Sustainable Development”, (A/RES/70/1*).
- ⁶ ICC, “*Resolving Climate Change Related Disputes through Arbitration and ADR*”, Report of the ICC Task Force on Arbitration of Climate Change Related Disputes: <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>
- ⁷ Annex to Communication COM(2019) 640 final of 11 December 2019, « The European Green Deal », *supra*.
- ⁸ *Id.*, pt. 2.1.1. *in fine*.
- ⁹ *Id.*, pt. 2.1.6.
- ¹⁰ *Id.*, pt. 2.1.1.
- ¹¹ Communication COM(2019) 640 final of 11 December 2019, “The European Green Deal”, *supra*, pt. 2.1.1.
- ¹² Paris Agreement under the UN Convention on Climate Change, UNFCCC/CP/2015/10/Add.1.
- ¹³ Proposal for a Regulation establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law), COM(2020) 80 final, 2020/0036 (COD).
- ¹⁴ Regulation 2018/1999 of 11 December 2018, on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013, OJ L 328/1.
- ¹⁵ Directive 2003/87 of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading [2003] OJ L 275/32.
- ¹⁶ Regulation 2018/842 of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 [2018] OJ L 156/26.
- ¹⁷ Regulation 2018/841 of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU [2018] OJ L 156/1.
- ¹⁸ Commission Communication of 20 July 2016 COM(2016) 500 final.
- ¹⁹ Commission communication of 30 November 2016 COM(2016) 0860 final.
- ²⁰ Directive 2018/2001 of 11 December 2018 on the promotion of the use of energy from renewable sources [2018] OJ L 328/82.
- ²¹ Directive 2010/31 of 19 May 2010 on the energy performance of buildings [2010] OJ L 153/13.
- ²² Directive 2012/27 of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC [2012] OJ L 315/1.
- ²³ Communication COM(2019) 640 final of 11 December 2019, « The European Green Deal », *supra*, pt. 2.1.3.
- ²⁴ *Id.*, pt. 2.1.7.
- ²⁵ *Id.*, pt. 2.1.8.
- ²⁶ *Id.*, pt. 2.1.1.
- ²⁷ A public consultation on a proposed draft ETS State aid Guidelines was launched in March 2020.
- ²⁸ Communication COM(2019) 640 final of 11 December 2019, « The European Green Deal », *supra*, pt. 2.1.1.
- ²⁹ *Id.*, para 2.2.1.
- ³⁰ <https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/> (consulted on 15 May 2020)
- ³¹ ICC, “*Resolving Climate Change Related Disputes through Arbitration and ADR*”, Report of the ICC Task Force on Arbitration of Climate Change Related Disputes: <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf>
- ³² See, Emmanuel JOLIVET, Chronique de jurisprudence arbitrale de la Chambre de commerce internationale (CCI) : aspects du droit de l'environnement dans l'arbitrage CCI, *Gaz. Pal.*, 4 December 2004, page 54 ; Emmanuel JOLIVET & Laurence MARQUIS, Arbitrage commercial international et litiges environnementaux : illustrations dans des affaires récentes, Cahiers de l'arbitrage, 2011-1, page 91.
- ³³ Patrick THIEFFRY, Arbitrage et droit européen de l'environnement, *Rev. Arb.*, n° 4/2019, page 1069.
- ³⁴ EFTA Surveillance Authority, Case No 83877, Decision of 10 September 2019 No 064/19/COL EFTA, *Arbitral award between Landsvirkjun and Elkem*, [2019] OJEU, No. C 409/11; the full redacted decision is available at: <http://www.eftasurv.int/state-aid/state-aid-register/decisions/>.
- ³⁵ ICC, “*Resolving Climate Change Related Disputes through Arbitration and ADR*”, *supra*, para. 2.3.
- ³⁶ *Id.*, paras. 2.4-2.6, and footnote 13.