sciendo

*ICLR, 2024, Vol. 24, No. 1.*

# A Just Energy Transition in the International Investment Agreements

**Monika Feigerlová**

Institute of State and Law of the Academy of Sciences, Czech Republic
monika.feigerlova@ilaw.cas.cz

FEIGERLOVÁ, Monika. A Just Energy Transition in the International Investment Agreements. *International and Comparative Law Review*, 2024, vol. 24, no. 1, pp. 180–200. DOI: 10.2478/iclr-2024-0012

**Summary:** The polarity of arguments is significant among EU Member States, EU institutions, and scholars on the modernisation outcome of the Energy Charter Treaty (ECT). The principal disagreement is whether the modernised agreement aligns with the Paris Agreement and meets the goals of a 'just transition'. The modernised treaty, as a first investment treaty, has introduced a flexibility mechanism to end the protection of fossil-fuel related investments. The article aims to analyse the draft reformed treaty from a conceptual perspective, aiming to contribute to an understanding of the just transition concept in the context of international investment law and transitioning away from fossil fuel-related investments.

**Keywords:** international investment protection; just transition; energy transition; fossil-fuel phase out; modernised ECT.

## 1 Introduction

The five-year modernisation process[1] over the Energy Charter Treaty (ECT)[2] neither found consensus among EU Member States nor received approval by the European Parliament[3] with the principal argument that the modernised treaty is not aligned with the Paris Agreement[4] and does not meet just transition goals. Subsequently, several EU Member States announced plans to withdraw from the ECT outright, arguing that the reformed treaty does not go far enough to

1 The modernisation process of the Energy Charter Treaty was initiated in 2017 and negotiations were concluded on 23 June 2022 with an 'agreement in principle' (modernised treaty). The full text of the agreement in principle was made unofficially public on 13 September 2022. INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT. *Newly Released Text for Modernized Energy Charter Treaty Shows Too Many Potential Obstacles for Climate Action*. [online]. Available at: <https://www.iisd.org/articles/statement/newly-released-text-modernized-energy-charter-treaty> Accessed 28.02. 2023.

2 Energy Charter Treaty (Annex I of the Final Act of the European Energy Charter Conference) (signed 17 December 1994, entered into force 16 April 1998) (1995) 34 ILM 373.

3 EUROPEAN PARLIAMENT. Resolution on the outcome of the modernisation of the Energy Charter Treaty dated 24 November 2022, 2022/2934(RSP) para 5.

4 Paris Agreement under the United Nations Framework Convention on Climate Change (signed 12 December 2015, entered into force 4 November 2016).

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

address their climate change obligations.[5] Three EU Member States proceeded with submitting withdrawal notices to the ECT's Depositary at the end of 2022, followed by Luxembourg in 2023.[6] The EU Commission, whose mandate to negotiate on behalf of all EU Member States explicitly contained clean energy transition goals and achieving the objectives of the Paris Agreement, was of the view that the modernised ECT would preserve the EU's ability to develop climate policies.[7] However, due to the above terminations, in July 2023, the Commission, despite its previous proposal to ratify the modernised treaty, decided to suggest to the Member States a coordinated EU withdrawal from the ECT, including Euratom.[8] At the time of writing, the debate within EU is ongoing, while the ECT Secretariat is seeking to secure a non-objection vote from the EU, so that the reformed text could be implemented at least among the remaining ECT contractual parties.[9]

---

5 The representatives of six states phrased in different words that the climate change concern cause their intention to withdraw, namely Slovenia (the treaty is a 'key obstacle to' effective climate policy), Spain (the modernisation process is insufficient to address the State's climate concern), Netherlands (despite significant improvements there is still insufficient progress in aligning the treaty with the Paris Agreement), Luxembourg (the modernised text 'remains too protective of investments in fossil fuels and nuclear energy'), Germany (the treaty is 'an obstacle to the energy transition') and France ('quitting the ECT is coherent with the Paris Agreement'). See BOHMER, Lisa. Another EU state announces its withdrawal from the ECT, as EU Commission stands its ground. *Investment Arbitration Reporter,* 10 November 2022; MATHIESEN, Karl. Spain pulls out of energy treaty over climate concerns. *Politico,* 12 October 2022; BOHMER, Lisa. Dutch government announces intention to withdraw from Energy Charter Treaty, *Investment Arbitration Reporter*, 18 October 2022; CHARLOTIN, Damien. The latest EU state to leave the Energy Charter Treaty: Luxembourg. *Investment Arbitration Reporter*, 18 November 2022; GERMANY'S MINISTRY FOR ECONOMIC AFFAIRS AND CLIMATE ACTION. Press Release. *Bundeskabinett fasst wichtige Zukunftsbeschlüsse*. [online]. Available at: <https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/11/20221130-habeck-bundeskabinett-fasst-wichtige-zukunftsbeschlusse.html> Accessed: 30.11.2023; MATHIESEN, Karl. France to leave Energy Charter Treaty, says Macron. *Politico*, 21 October 2022; CONSEIL POUR LE CLIMATE. *Report on the Modernisation of the Energy Charter Treaty* [online]. Available at: < https://www.hautconseilclimat.fr/wp-content/uploads/2022/10/2022-10-19-TCE_HCC_EN.pdf> Accessed: 30.11.2023.

6 ECT SECRETERIAT. *Written notifications of withdrawal from the Energy Charter Treaty*. [online]. Available at: <https://sciendo-parsed-data-feed.s3.eu-central-1.amazonaws.com/ICLR/Instructions_for_Authors.pdf> Accessed: 30.11. 2023. The countries concerned were France, Germany, and Poland.

7 COUNCIL OF THE EUROPEAN UNION. Negotiating Directives for the Modernisation of the Energy Charter Treaty – Adoption (2 July 2019) 10745/19 ADD 1; EUROPEAN COMMISSION. Press Release Agreement in principle reached on Modernised Energy Charter Treaty. [online]. Available at: <https://policy.trade.ec.europa.eu/news/agreement-principle-reached-modernised-energy-charter-treaty-2022-06-24_en> Accessed: 30.11. 2023.

8 Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty, 7.7.2023 COM(2023) 447 final.

9 ECT SECRETARIAT. Statement by the Secretary General of the Energy Charter Secretariat on the draft Council Decision proposing the withdrawal of the European Union from the Energy Charter Treaty dated 11 July 2023. [online]. Available at: < https://www.energycharter.org/media/news/article/statement-by-the-secretary-general-of-the-energy-charter-secretariat-on-the-draft-council-decision-p/> Accessed: 30.11. 2023.

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

The focus of this article is to analyse the draft reformed treaty from a conceptual perspective, aiming to contribute to an understanding of the just transition concept in the context of international investment law.

In short, the reformed treaty would allow its contracting parties to phase out investment protection for fossil fuels in their own territories and refine substantive investment protection provisions.[10] The right of the state to regulate has received a stand-alone provision in the reformed treaty and has been further detailed in the expropriation clause specifically with respect to climate change mitigation and adaptation. Provisions on fair and equitable treatment (FET) and indirect expropriation were clarified to remove their historically criticised generality and ambiguity. The threshold for a breach of the FET standard was raised by an enumerative list of breaches. The revised provisions further stipulate that only clear and specific representations of the state can induce the legitimate expectations of the investor.

The polarity of the arguments on the reformed treaty is extraordinary[11] given that the revised investment standards of protection, with the exception of the investor-state dispute settlement (ISDS), are largely identical with other EU investment treaties, such as CETA,[12] which is now being ratified by the EU Member States without containing any specific climate and just transition goals.

Fossil fuels are the main contributor to climate change, and scientists consider the next ten years crucial for reducing fossil fuel usage.[13] Coal phase-outs, moratoria, licence bans, and the termination of oil operations will directly affect relations between investors and host states. The ECT is specifically feared by states and civil society that it could be used as a tool for fossil-fuel companies to claim compensation against governments for their national phase-out legislation and

---

10 ECT SECRETARIAT. Decision of the Energy Charter Conference: Public Communication explaining the main changes contained in the agreement in principle dated 24 June 2022, CCDEC 2022 10 GEN.

11 In scholarly works see for example criticism by BRAUCH, Martin Dietrich. The Agreement in Principle on ECT "Modernization": A Botched Reform Attempt that Undermines Climate Action. *Kluwer Arbitration Blog*, 17 October 2022. For opposite se TIETJE, Christian. Der Energiecharta-Vertrag im Kreuzfeuer der Kritik. Ist der Rücktritt vom Energiecharta-Vertrag wirklich ein großer Wurf der Ampelkoalition?' *Verfassungsblog*, 15 November 2022. See also VERBEEK, Bart-Japp. The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises? *Business and Human Rights Journal,* 2023, 1–6; VAN AAKEN, Anne. Investment Law in the Twenty-First Century: Things Will Have to Change in Order to Remain the Same. *Journal of International Economic Law*, 2022, 1–11.

12 Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part (signed on 30 October 2016, not in force). Parts of the treaty falling outside the competence of the Union, including Chapter 8 Section F on investor-state dispute settlement, will only enter into force after all individual EU Member States have ratified the treaty. As of 30 November 2022, 17 EU Member States, plus the UK, have ratified the treaty, which, as a mixed agreement, requires ratification by all EU Member States.

13 SECRETARIAT UNFCCC. Nationally determined contributions under the Paris Agreement – Synthesis Report by the Secretariat dated 17 September 2021, FCCC/PA/CMA/2021/8 para 15.

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

restriction they might place on the use of investments and stranding of assets.[14] Recent examples include German companies seeking compensation from the Dutch government for the forced early closure of coal-fired power plants.[15] Simultaneously, the ECT fell into disrepute by the wave of 'solar arbitrations' over renewable energy incentives, which heightened the controversy surrounding ECT.

Hence, civil society pressure on the ECT has been significant, even though the relevant fora under the international climate instruments (e.g. UNFCCC)[16] have by and large failed to address fossil fuels.[17] The main criticism over the reformed treaty seems to be directed not at what the modernisation process has achieved, but at what the modern agreement could have regulated towards a just energy transition and the achievement of climate goals.[18] The ECT is not just an international investment agreement. It is an energy treaty that regulates three main fields (trade, investment and transit) and establishes dispute settlement procedures. It also regulates certain aspects of environmental protection and energy efficiency among the contracting parties.

The critique of the outcome of modernisation has opened a dialogue between climate, energy and investment, which have so far been dealt separately.[19] This article reflects on modernising the ECT from the perspective of the energy transition away from fossil fuels. First, it investigates climate change commitments in relation to energy investments, the concept of a just transition and energy transition disputes relating to phase-outs, focusing on investment arbitration (Section II). The need for decarbonisation measures that limit the expansion and production of fossil fuel and their impact on fossil fuel investors is the rationale and point of departure for assessing what was agreed upon in the modernised ECT to enable effective energy transition (Section III). The 'flexibility mechanism' and revised provisions on the indirect expropriation of the modernised ECT are the most critical amendments for transition measures. Finally, this article finishes

14 The ECT has generated the highest number of investor–state arbitrations that were conducted under international investment agreements.

15 *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v Kingdom of the Netherland*, ICSID Case No ARB/21/22, proceedings commenced on 30 April 2021; and *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No ARB/21/4, proceedings commenced on 2 February 2021. See also PUTTER, Stan. The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations. *Kluwer Arbitration Blog*, 24 August 2021.

16 United Nations Framework Convention on Climate Change (signed 9 May 1992, entered into force 21 March 1994) (UNFCCC).

17 NEWELL, Peter, VAN ASSELT, Harro, DALEY, Freddie. Building a fossil fuel non-proliferation treaty: Key elements. *Earth System Governance*, vol. 14, 100159, 1.

18 For example, Brauch points to the missed opportunity to convert the ECT into an effective 'international legal instrument to govern energy investment for a just transition to zero-carbon energy systems and economies' that would include, among others, commitments or guidelines for phase out of fossil fuel subsidies, mandates and standards to drive investments in clean technologies, technology transfer, mechanisms addressing just transition. See BRAUCH (n 11).

19 See e.g. OECD. OECD' s initiative on the Future of Investment Treaties. [online]. Available at: < https://www.oecd.org/investment/investment-policy/investment-treaties.htm Accessed: 30.11. 2023.

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

with concluding remarks highlighting the need for a coherence between climate, energy and investment.

## 2 Setting the Stage: Climate Change Commitments and Energy Investments

### 2.1 Energy Sector and Climate Goals

According to scientists, the time window for limiting global warming to 1.5˚C and reaching net zero by the mid-century is closing and, fundamental changes need to happen in this decade to avert the worst scenarios.[20] Fossil fuel combustion and industrial processes account for two-thirds of all greenhouse gas (GHG) emissions[21] and the energy sector will require major transition changes.[22]

A number of countries have pledged to achieve net-zero emissions, or to direct public funds to just transition in connection with the Paris Agreement.[23] Many governments set targets for increasing renewables in the energy mix and the electrification of key sectors.[24] The report that synthesizes information from over 160 nationally determined contributions (NDCs)[25] found that measures to support renewable energy generation (so called demand-side policies)[26] so far dominate among mitigation options to reduce GHG emissions and that they are insufficient to meet the Paris Agreement goals.[27] Recent report by the Intergovernmental Panel on Climate Change (IPCC) established the need to move away from fossil fuels.[28] The immediate action that is required includes especially decommissioning of existing fossil fuel installations in the power sector and cancellation of new installations.[29] Similarly, in its 'Net Zero by 2050' scenario, the International

---

20 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). Summary for policymakers. In *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*. World Meteorological Organization, Geneva, 2018, Ch 3–24, 15.

21 IPCC, 2022: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge University Press (AR6 Mitigation), SPM–7.

22 Ibid SPM–14.

23 In addition to the EU, 110 other countries signed up to achieving carbon neutrality by 2050 and China by 2060. UNITED NATIONS. *The Race to Zero Emissions, and Why the World Depends on It?* [online]. Available at: <https://news.un.org/en/story/2020/12/1078612> Accessed 30.11. 2023.

24 NDC Synthesis Report (n 13) para 15.

25 Under Article 4 (2) of the Paris Agreement, each Party is required to prepare, communicate and maintain successive nationally determined contributions that it intends to achieve towards the temperature goal of the Paris Agreement.

26 VAN ASSELT, Harro. Governing fossil fuel production in the age of climate disruption: Towards an international law of 'leaving it in the ground'. *Earth System Governance*, 2021, vol. 9, 100118, 1.

27 NDC Synthesis Report (n 13) para 28.

28 AR6 Mitigation (n 21) SPM 20.

29 Ibid Ch. 2, 7, para l. 28–31.

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

Energy Agency calls for an immediate end to new fossil fuel infrastructure and an end to coal-fired power plants in industrialised countries by 2030.[30]

At the political level, the most formal acknowledgment of the importance of action on fossil fuels is the Glasgow Climate Pact of 2021 in which governments pledged to 'accelerate efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies' at the closing of the 26th Conference of the Parties (COP) to the UNFCCC that took place in Glasgow in 2021.[31] From a legal perspective the commitment of the parties is rather weak and narrow (not mentioning oil and gas). The phrasing is hortatory ('calls upon') and indirect ('accelerating efforts towards') with no timeframes specified.[32] The 'phasedown', a linguistic last-minute compromise demanded by coal-dependent China and India, does not suggest an end but merely reduction.[33] Nevertheless, this decision can be considered significant in terms of the UNFCCC parties' recognition of collective action on fossil fuels as a climate issue. The need for supply side policies addressing restrictions on production and use of fossil fuels also proliferates in scholarly writings,[34] such as an academic proposal for a binding Fossil Fuel Non-Proliferation Treaty, setting limits to further expansion of fossil fuel extraction and use,[35] or a similar academic proposal for a Coal Elimination Treaty to phase out the mining and burning of coal by 2030, which contain obviously much stronger commitments.[36]

### *2.2 Need for a 'Just Transition' and Its Evolving Legal Meaning*

The Paris Agreement does not mention fossil fuels, nor does it contain an explicit commitment requiring parties to limit fossil fuel production.[37] However, its overall mitigation goal, expressed as a temperature objective to limit global warming to 'well below 2°C, preferably to 1.5°C, compared to pre-industrial levels'[38] and to align finance flows with a low GHG emissions pathway and climate-resilient development, [39] must be interpreted as a commitment to move away from fossil fuels, which are the main driver of global emissions.[40]

---

30 INTERNATIONAL ENERGY AGENCY. *Net Zero by 2050: A Roadmap for the Global Energy Sector*. [online]. Available at: < iea.li/nzeroadmap> Accessed 30.11. 2023.

31 UNFCCC's Decision –/CMA.3, advance unedited version, paras. 21, 22, 29, 36. The Glasgow Climate Pact comprises a set of international negotiated and agreed policy commitments and is not formally legally binding.

32 VAN ASSELT (n 26) 4.

33 Ibid.

34 VAN ASSELT, Harro, GREEN, Fergus. COP26 and the dynamics of anti-fossil fuel norms. *Wiley Interdisciplinary Reviews: Climate Change*, 2022, e816.

35 NEWELL et al. (n 17).

36 BURKE, Anthony, FISHEL, Stefanie. A coal elimination treaty 2030: Fast tracking climate change mitigation, global health and security. *Earth System Governance*, 2020, vol. 3, 100046.

37 VAN ASSELT (n 26) 3.

38 Paris Agreement (n 4) art 2 (1) (a).

39 Ibid art 2 (1) (c).

40 VAN ASSELT (n 26).

The Paris Agreement allows each country to develop its own NDC to cut global emissions. This enables national governments to tailor climate policy to maximise political support. It shifts the realization of the Paris Agreement from international law level to national law and national policymakers' activity.[41]

The notion of a 'just transition' is included in the Preamble of the Paris Agreement with regard to 'imperatives of a just transition of the workforce and the creation of a decent work and quality jobs'.[42] Similarly, the goals of decent work for all, social inclusion and the eradication of poverty are recognised in the International Labour Organization's Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All.[43]

The just transition concept has expanded beyond its origins in the labour movement with the aim at protecting those who would bear an undue burden of the costs of decarbonisation.[44] While the term, 'just transition', is increasingly prevalent in the public discourse, in economy and politics, it remains poorly defined in legal literature in which the discussion has only started.[45] Little consensus exists today as to what a just transition means.[46] For example, Johansson considers a just transition as a concept that has legal implications and that mandates the implementation of climate measures in a way that engages and protects affected and vulnerable people and communities.[47]

Across disciplines, the concept of a just transition remains vague. The 2022 IPCC report, in its Glossary Annex, adopts a broad understanding of a 'just transitions' as a set of principles, processes and practices that aim to ensure that no people, workers, places, sectors, countries or regions are left behind in the transition from a high-carbon to a low-carbon economy.[48] It stresses the need for targeted and proactive measures from governments, agencies, and authorities to ensure that any negative social, environmental or economic impacts of economy- wide transitions are minimised, whilst benefits are maximised for those disproportionally affected.[49]

In a broad sense, just transition ensures both a fair and equitable process for moving towards a post carbon society for all individuals and communities. It must seek fairness and equity with regards to justice concerns such as ethnicity,

---

41 VAN CALSTER, Geert, REINS, Leonie (ed). *The Paris agreement on climate change: A commentary*. Edward Elgar Publishing, 2021, p. 74, para 2.03.

42 Paris Agreement (n 4) preamble.

43 INTERNATIONAL LABOUR ORGANIZATION. *Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for Al*l. Geneva: ILO, 2015.

44 DOOREY, David J., EISENBERG, Ann. Epilogue: The Contested Boundaries of Just Transitions. In CHACARTEGUI, Jávega, Consuelo (ed). *Labour law and ecology*. ARANZADI/CIVITAS, 2022.

45 EISENBERG, Ann M. Just transitions. *Southern California Law Review,* 2018, vol. 92, 2, pp. 273 –330. But see JOHANSSON, V. Just Transition as an Evolving Concept in International Climate Law. *Journal of Environmental Law*, 2023, eqad017.

46 DOOREY (n 44).

47 JOHANSSON (n 45).

48 IPCC, 2022: Mitigation of Climate Change, Annex 1 Glossary.

49 Ibid.

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

income, gender, within both developed and developing contexts.[50] The new low-carbon economy should not replicate inequalities and environmental injustice, and inequitably distributed environmental hazards of the current fossil fuel-based economy.[51] Related concepts of distributory justice help navigate on fair allocation of the costs and benefits of a transition.

The states' practice shows a recognition that a transition to climate neutrality[52] must be just and equitable. For instance, in 2015, the South Africa was the first country to mention the just transition in its initial NDC submitted under the Paris Agreement. The use of the phrase 'just transition' increasingly spread in the NDCs submitted by the states after 2020. At least 35 NDCs included a reference to this concept, including the EU NDC (representing 27 EU Member States), UK,[53] Norway,[54] Egypt[55], Canada.[56] Several NDCs also referred to a 'fair transition' (e.g. Moldova).

The concern is that changes will have a disproportionate impact on groups of people within the same countries, i.e. specific groups of workers and communities, particularly in regional areas with specialized workforces and those particularly exposed to the changing climate, as well as on different countries. Global carbon budget is blind to geography, history and socio-economic context. Countries that have contributed least to the problem historically, those in the Global South, are likely to be hardest hit by the adverse climate impacts.

In 2021, just transition was a central theme at COP26 beyond the workforce context. Para 20 of the Glasgow Climate Pact reads: "*Calls upon Parties …to transition towards low-emission energy systems… while providing targeted support to the poorest and most vulnerable in line with national circumstances and recognizing the need for support towards a just transition*". The concept is here connected with the poorest and most vulnerable.

---

50 MCCAULEY, Darren, HEFFRON, Raphael. Just transition: Integrating climate, energy and environmental justice. *Energy Policy*, 2018, 119, pp. 1–7.

51 EISENBERG (n 45) see literature cited therein.

52 Article 4(1) of Paris Agreement.

53 UK updated NDC: 'Just Transition. The UK is dedicated to supporting workers, communities and businesses to transition to net zero'. [online]. Available at: < https://unfccc.int/sites/default/files/NDC/2022-09/UK%20NDC%20ICTU%202022.pdf > Accessed 30.11. 2023.

54 Update of Norway's nationally determined contribution: 'Just transition:… It is a priority for the Government to facilitate the creation of profitable green jobs through pricing, public procurement, regulations and measures that supports technology development.' [online]. Available at: < https://unfccc.int/sites/default/files/NDC/2022-11/NDC%20Norway_second%20update.pdf> Accessed 30.11. 2023.

55 Egypt NDC 2022: 'This NDC update is Egypt's pledge for climate change action up to 2030 anchored and dependent on international financial support, ensuring just transition, and appropriateness to national capabilities.' [online]. Available at: <https://unfccc.int/sites/default/files/NDC/2022-07/Egypt%20Updated%20NDC.pdf.pdf> Accessed 30.11. 2023.

56 Canada NDC 2021: 'Just Transition: Addressing climate change requires the participation of all Canadians [..] Canada is committed to supporting workers and their communities as the world moves toward a low-carbon, net-zero future.' [online]. Available at: <https://unfccc.int/sites/default/files/NDC/2022-06/Canada%27s%20Enhanced%20NDC%20Submission1_FINAL%20EN.pdf > Accessed 30.11. 2023.

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

It can be summed up that in the context of decarbonisation, just transition is seen as a principle of easing the burden that decarbonisation poses to those who depend on high-carbon industries, and the most vulnerable.[57] It helps national governments in implementing climate measures in a way that engages and protects affected and vulnerable people and local communities.[58]

### *2.3 The Applicability of a Just Transition Concept to Investments*

In implementing the Paris Agreement, states and non-state actors commit to various net-zero emission scenarios or to direct public funds to just transition in variety of forms, including non-legally binding pledges, declarations or policies and legal acts.[59] The EU formulated priorities regarding fight against climate change and climate neutrality by 2050 in the European Green Deal,[60] and subsequently adopted the EU Climate Law, which sets a target of reaching net-zero GHG emissions within the EU by 2050 with an intermediate 2030 target.[61] Correspondingly, the EU set its nationally determined contributions at the binding intermediate target of a net domestic reduction of at least 55 % in GHG by 2030 compared to 1990.[62] This will require significant changes across industry sectors and in the energy systems. While the nature and extent of the measures to transition away from fossil fuels and meet emission reduction targets are largely at the discretion of national governments, they should be consistent with the principle of a just transition.[63]

As demonstrated above, the just transition concept is perceived as primarily addressing governments while they design transition and climate measures. The relationship between investors and just transition in the extractive industry has been recently explored by the UN Working Group on the issue of human rights and transnational corporations. It has found[64] that energy transition programmes, their design, financing and implementation, have been linked or have contributed to serious human rights abuses such as land-grabbing, forced displacements, modern slavery, discrimination and environmental pollution. In its analysis, advancing a just transition in the extractive sector requires the fair and equitable

57 Ibid. 273.
58 JOHANSSON (n 45).
59 UNITED NATIONS (n 23).
60 EUROPEAN COMMISSION. Commission communication of 11 December 2019 on the European Green Deal' (2019) COM(2019)0640. Green Deal is an action plan that includes a set of steps aiming to achieve carbon neutrality for the EU economy by 2050.
61 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (European Climate Law).
62 COUNCIL OF THE EUROPEAN UNION. Submission to the UNFCCC on Behalf of the European Union and Its Member States on the Update of the Nationally Determined Contribution of the European Union and Its Member States, 2020, 14222/1/20 REV 1 para 27.
63 VAN ASSELT (n 26) 3.
64 Report of the Working Group on the issue of human rights and transnational corporations / Extractive sector, just transition and human rights, UN Doc. A/78/155 of 11 July 2023.

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

distribution of benefits and burdens of energy transition programmes and the participation and access to remedy for victims of human rights abuses, across the entire value chain. The analysis considers investments contracts with stabilization clauses and international investment agreements with ISDS to create constraints to a just transition.[65] Specifically, stabilization clauses in extractive contracts restrict the ability of states to update existing laws and contracts. In their international investment agreements state should preserve the ability to effectively regulate energy transition programmes.[66]

The above findings suggest that the just transition is not connected only with impacts on people but also with impacts on the countries of the Global South. For example, supply-side response measures in the context of energy transition, such as fossil fuel moratoria, fossil fuel subsidy reform, diversification, and divestments, exceed purely local impacts and have consequences in other countries, mainly those of Global South. These aspects of energy transition measures and practice towards just transition and whether they can be made relevant within the international investment treaties still needs to be further explored, including the role of emerging 'just energy transition partnerships'.

The European Parliament mentions 'disputes in relation to policies on the just transition' in the context of investment protection agreements and their compatibility with EU policies.[67] This suggests a broad understanding by the European Parliament of the just transition equation (beyond workforce) when it comments on investment agreements and their alignment with the Paris Agreement objectives. However, it does not go any further to clarify just transition goals in connection with the international investment regime itself and the EU external investment policy. It rather appears that just transition policies as national measures can come into traditional conflict with states' obligations to afford certain standards of protection to investments under international investment agreements.

### *2.4 Energy Transition in Investment Arbitration*

The energy transition poses several challenges in the investment arbitration context. The ECT like most investment treaties offer legal protection to foreign investors against certain types of government measures or conduct. In case of a dispute, investors may bring claims against host states before international arbitration (investor-state dispute settlement, ISDS) in pursuit of monetary compensation. In the investment treaties the states especially commit to ensure foreign investors are subject to fair and equitable treatment and are compensated in the event their investments are expropriated. The expropriation often includes indirect expropriation, which covers regulatory measures, including those related

65 Ibid, para 14.
66 Ibid., para 68(f).
67 EUROPEAN PARLIAMENT. Resolution of 23 June 2022 on the Future of EU International Investment Policy dated 23 June 2022, 2021/2176(INI) para 24.

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

to climate policies or energy transition. In its Sixth Assessment Report of 2022, the IPCC specifically highlighted the risks of the investor-state dispute settlement (ISDS) system contained in bilateral and multilateral treaties, including the ECT, being used to challenge 'national legislation aimed at phasing out the use of [investors'] assets.[68]

In academic writings, energy transition cases are understood as claims brought by companies affected by energy transition policies, in international or domestic litigation, where the objective of the measures at issue may be triggered by a low-carbon transition, including renewable energy schemes, or by other considerations or climate change rationales.[69] Two examples of disputes that concern phase outs of nuclear energy and coal-fired electricity generations illustrate that a contested government measure often leads to claims both under international investment treaties and domestic constitutional law.

The first example relates to German energy transition and includes several disputes brought by Swedish investor *Vattenfall* against Germany for measures restricting coal-fired power generation project[70] and the phase-out of nuclear energy.[71] Both cases were settled at the level of international investment arbitration, upon issuance of a modified permit[72] in the first case and upon obtaining financial compensation in the second one.[73] While the first claim, filed in 2009, related to the issuance of an operating license for a new coal-fired power plant, the second case arose from the decision of the German Parliament to accelerate the phase-out of nuclear energy in the country, following the 2011 Fukushima nuclear accident, and to shut down all remaining nuclear energy reactors by 2022. The same measure was subject to domestic proceedings and, while arbitration claim was pending, the German Constitutional Court rendered two successive decisions in favour of Vattenfall, concluding in its 2020 decision[74] that the financial compensation system of the nuclear phase-out law[75] was partially

68 AR6 Mitigation (n 21) Ch 14, p 81.

69 CAMBRIDGE RESEARCH GROUP ON FOREIGN INVESTMENT AND THE ENVIRONMENT. OECD Public Consultation on Investment Treaties and Climate Change. Response paper. [online]. Available at: < https://www.oecd.org/investment/investment-policy/OECD-investment-treaties-climate-change-consultation-responses.pdf> Accessed 30.11. 2023.

70 *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, ICSID Case No ARB/09/6, Award (11 March 2011).

71 *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12, Discontinuance Order (9 November 2021).

72 Vattenfall I (n 70).

73 BOHMER, Lisa. Vattenfall asks for discontinuance of ICSID arbitration against Germany, after settlement enters into force. *Investment Arbitration Reporter,* 2 November 2021. A global settlement agreement concluded between Germany with all affected energy companies provides that Vattenfall is entitled to approximately 1.4 billion EUR in compensation.

74 Order of the Federal Constitutional Court (29 September 2020), 1 BvR 1550/19.

75 Thirteenth Act Amending the Atomic Energy Act (13. Gesetzes zur Änderungdes Atomgesetzes, 31 July 2011, Bundesgesetzblatt 2011 Seite 1704).

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

unconstitutional and that a 2018 amendment to the nuclear law,[76] required by the 2016 decision of the Constitutional Court,[77] was still in violation with the constitution. Amendment No. 13 setting the decommissioning dates was inconsistent with the right to property protected by Article 14(1) of the German Constitution since it affected the claimants' right to unused residual electricity volumes. Further Amendment No. 16 provided that nuclear energy producers were entitled to compensation, but only if they had made a good faith effort to sell residual energy at a reasonable price. As the conditions of the sale were insufficiently clear in the law, subordinating compensation to reasonable efforts by Vattenfall was, among other issues, found unconstitutional. Given the settlement of the investment dispute the arbitral tribunal's assessment under the ECT can only be speculated. Nonetheless, the case illustrates an important dimension of transition processes, which from a legal point of view must address previously acquired rights.[78]

The second example illustrates how foreign investor's right can be used to recover the value of assets in connection with energy transition implemented in pursuit of climate change objectives and where the adequate compensation is at stake. German investors, energy companies RWE[79] and Uniper,[80] filed claims under the ECT against the Netherlands for its decision to phase out coal based power generation by 2030, which is before the end of affected plant's economic lifespan.[81] The measure is part of the Dutch climate policy to become carbon neutral[82] as advanced pursuant to *Urgenda* judgment, arising from climate litigation activity.[83] The plants at stake were commissioned around five years before the ban and one plant was allegedly in part built at the specific request of the State in 2004 regarding continuity in the power supply during country's energy transition.[84] The right to regulate was at the heart of the Netherland's defence, however, the cases

76 Sixteenth Act Amending the Atomic Energy Act (16. Gesetz zur Änderung des Atomgesetzes – 16. AtG-Novelle, 16th AtG Amendment).

77 Judgment of the Federal Constitutional Court (6 December 2016), BVerfGE 143, 246, paras 1–2 and 4.

78 VIÑUALES, Jorge E. *The International Law of Energy.* Cambridge University Press, 2022, p. 474.

79 *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the* Netherlands, ICSID Case No ARB/21/4.

80 *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands,* ICSID Case No ARB/21/22.

81 Law Prohibiting the use of Coal with the Production of Electricity in 2019, Staatsblad 2019 493. Under this law, coal-fired power plants will eventually (by 2030 at the latest) no longer be allowed to use coal as fuel to generate electricity.

82 GOVERNMENT OF THE NETHERLANDS. Climate Policy. [online]. Available at: <https://www.government.nl/topics/climate-change/climate-policy> Accessed 30.11. 2023.

83 *Urgenda Foundation v the State of the Netherlands*, District Court of the Hague, Case C/09/456689/HA ZA 13-1396, Judgment (24 June 2015); *The State of Netherlands v Urgenda*, Court of Appeal of the Hague, Case C/09/456689/HA ZA13-139 Judgment (9 October 2018); *The State of Netherlands v Urgenda*, Supreme Court, Case 19/00135 Cassation Judgment (20 December 2019).

84 PUTTER, Stan. The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations. *Kluwer Arbitration Blog*, 24 August 2021.

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

were withdrawn under political pressure. Nonetheless, parallel compensation claims by several power plants relating to the same measure were rejected by the Dutch courts.[85] While applying fair balance test under human rights law instruments the Dutch courts concluded that the coal phase-out legislation was suitable to achieve the objective of reducing $CO_2$ emissions, a fair balance was struck between the need to protect the public interest and the burden that was placed on the plant owners and the interference with their property rights was not unlawful.[86]

As these cases show, fossil fuel phase-out policies can attract attention of international investment agreements, and countries in the Global South, particularly those producing oil and gas, are at risk.[87] Furthermore, energy transition disputes also include claims by investors from carbon-neutral energy sectors that in fact now represent two thirds of all ECT cases. Investments disputes over changes to renewable energy incentive schemes spread in Europe and elsewhere. The questions of regulatory stability and the application of the FET standard were central to the resolution of those disputes.[88] In spite of similarities the awards resulted in variety of outcomes and heighten the controversy around the ECT.

No investment award issued under the ECT has so far discussed climate change, just transition or climate-law obligations in substance.[89] Climate change or climate-related aspects of investments, if mentioned at all, were part of the background information and there is currently no guiding case law in the practice of investment arbitration.

## 3 Fossil Fuel Phase Out in the Reformed Treaty

Reducing GHG emissions across the full energy sector entails reduction in overall fossil fuel use, the deployment of low-emission energy sources, switching to

85 *RWE Generation NL B.V. v the State of the Netherlands*, District Court of the Hague, Case C:/09/608588/HA ZA 21-245, Judgment (30 November 2022); *RWE Eemshaven Holding II v the State of the Netherlands*, District Court of the Hague, Case C/09/608584 / HA ZA 21-244, Judgment (30 November 2022); and *Uniper Benelux N.V. et al v the State of the Netherlands*, District Court of the Hague, C/09/611221 / HA ZA 21/419, Judgment (30 November 2022).

86 BOHMER, Lisa. Dutch court declines RWE's and Uniper's damages claims prompted by the Netherland's coal phase-out, seeing no violation of human rights instruments; parallel ICSID arbitrations remain suspended. *Investment Arbitration Reporter*, 30 November 2022.

87 TIENHAARA, Kyla et al. Investor-state dispute settlement: obstructing a just energy transition. *Climate Policy*, 2023, vol. 23, issue 9, pp. 1197–1212.

88 See eg. SELIVANOVA, Yulia S. Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases. *ICSID Review*, 2018, vol. 33, issue 2, pp. 433–455; SIMÕES, Fernando Dias. When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking. *Denver Journal of International Law and Policy*, 2017, vol. 45, pp. 251–285.

89 IPP, Anja, MAGNUSSON, Annette, KJELLGREN, Andrina. The Energy Charter Treaty, Climate Change and Clean Energy Transition. A Study of the Jurisprudence. [online]. Available at: < https://www.climatechangecounsel.com/_files/ugd/f1e6f3_d184e02bff3d49ee8144328e6c45215f.pdf> Accessed 30.11. 2023. A study of ECT awards issued up to August 2021.

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

alternative energy carriers, and energy efficiency and conservation.[90] Restrictions or limitations of production impact on both future and existing investments in fossil fuels, from exploration and extraction activities to the operation of fossil-fuel fired power plants. The ECT's investment protection applies to a broad range of investments related to economic activities in the energy sector, covering all energy sources (e.g. nuclear energy, coal, natural gas, electricity, including from renewables) along the entire cycle.[91]

In general, commitments to not issuing any new licenses for gas and oil extraction or transitioning away from unabated coal power generation by 2030 start to emerge in minilateral climate clubs with a handful of countries.[92] Climate change law regimes (international and domestic) standardly do not address easements or compensations for revenues foregone in the context of clean energy transition.[93] Financial mechanisms for raising and distributing funds to compensate the rights holders for forgoing extraction are briefly considered in some of the academic proposals of treaties eliminating further expansion of fossil fuel extraction.[94] International investment treaties do not address fossil fuel phase-out yet. CETA, which is considered a progressive investment agreement of second generation, is technologically neutral and does not differentiate among energy sources according to their compatibility with climate policy commitments.[95]

It is the political-economic capacity of each country that determines the extent to which just transition concerns are given weight in coal phase-out processes and the level of support for affected stakeholders.[96] For example, Germany's law on country's coal phase-out set the rules for a progressive reduction of coal use by 2038 and approved an economic package to support coal regions and compensate lignite power plant operators.[97]

90 AR6 Mitigation (n 23) SPM-28.

91 See Definition of 'Investment' ECT (n 2) art 1.

92 For example, Beyond Oil and Gas Aliance (BOGA), a group of states led by Denmark and Costa Rica, agreed to end new concessions for gas and oil extraction and production within their jurisdiction and to set dates for ending existing ones. Another example is a 'Powering Past Coal Alliance' of 91 governments and businesses committed to phasing out unabated coal by 2050. See VAN ASSELT & GREEN (n 34) 5–6.

93 MUINZER, Thomas L. Conceptualising and Formulating National Climate Change Acts. In MUINZER, Thomas L. (ed). *National Climate Change Acts: The emergence, form and nature of national framework climate legislation.* Bloomsbury Publishing, 2020, p. 248.

94 PELLEGRINI, Lorenzo et al. Institutional mechanisms to keep unburnable fossil fuel reserves in the soil. *Energy Policy*, 2021, no. 149, 112029, pp. 2–3.

95 CETA (n 12) art 8.1, definition of 'covered investment'.

96 BANG, Guri, ROSENDAHL, Knut Einar, BÖHRINGER, Christoph. Balancing cost and justice concerns in the energy transition: comparing coal phase-out policies in Germany and the UK. *Climate Policy*, 2022, vol. 22, issue 8, 1000–1015.

97 Act to Reduce and End Coal-Powered Energy and Amend Other Laws (Kohleausstiegsgesetz), (BGBl. I S. 1818).

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

### *3.1 Flexibility Mechanism*

The compromise achieved in the ECT's reform must be viewed in the above context. The reformed treaty would continue to protect fossil fuel related investments indefinitely, however, a 'flexibility mechanism' incorporated in the treaty would allow contracting parties to exclude investment protection for fossil fuels in their territories. The investment protection provisions of the treaty (Part III of the ECT) would thus not apply to investments relating to excluded sources and activities. The mechanism excluding certain Energy Materials and Products for respective country would be implemented through a simplified procedure of modifications and technical changes to Annex NI to the ECT.[98]

As part of the reform process, only the EU and the UK indicated an interest to exclude protection of certain fossil fuels.[99] In their territories protection for existing fossil fuel investments would be maintained for 10 years with certain exceptions, starting from the entry into force of the modernised ECT or the start of provisional application of the new ECT, and ending at the latest by 2040. As regards new investments in fossil fuels, most new investments would not be protected.[100] Additionally, the UK would also end protection over coal related investments in its territory.[101]

The exclusions to the treaty regime do not automatically affect investment protection in the remaining ECT contracting parties who can opt to apply such exceptions *vis-à-vis* investors from the EU and the UK reciprocally also in their territories. Some Asian countries, led by Japan, strictly opposed the exclusion of fossil fuel investments from the treaty coverage. Both the flexibility mechanism and the list of materials shall be reviewed every five years to reflect on technological and political developments.[102] The modernised ECT also extends the treaty's coverage to include new activities, such as the capture, utilization, and storage of carbon dioxide for decarbonization purposes[103] in light of 'clean energy goals'.[104]

---

98 ECT 2 art 34(3)(m) The provisions of the modernised treaty are complex and also envisage in new Annexes NPT and IA-NI that investment protection under Part III of the ECT and investor-state dispute settlement under Article 26 of the ECT can be excluded where no protection of fossil energy sources is provided for individual parties (principle of reciprocity).

99 Modernised treaty (n 1) Annex NI (Section C). See also European Commission, 'Proposal for a Council decision on the position to be taken on behalf of the European Union in the 33rd meeting of the Energy Charter Conference' (5 October 2022) COM(2022) 522 final, 2022/0323 (NLE), 4–5.

100 Modernised treaty (n 1) Annex NI (Section B). Exceptions include investments in certain transitional sources, e.g. gas-fired power plants, and gas pipelines meeting defined parameters which remain protected until the end of 2030, or at latest until the end of 2040.

101 DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY. Press release UK strengthens protections for taxpayers in energy treaty negotiations. [online]. Available at: <https://www.gov.uk/government/news/uk-strengthens-protections-for-taxpayers-in-energy-treaty-negotiations> Accessed 30.11. 2023.

102 ENERGY CHARTER SECRETARIAT (n 10).

103 Modernised ECT (n 1) art 1(5).

104 ENERGY CHARTER SECRETARIAT (n 10).

The fossil fuel phase out periods and the fact that most ECT's contracting parties have not expressed intention to use the flexibility mechanism have become a great concern for climate commitments by several EU Member States. For example, France expressed concerns that entering into the reformed treaty would collide with France's international agreements such as the Coalition for the Transition from Coal to Clean Energy and the BOGA which require immediate phase-outs.[105] There is disagreement among EU member states themselves on the progress needed to phase out fossil fuels in order to meet the Paris Agreement's 1.5°C target, leading to difficulties in reaching agreement on the reformed ECT.[106]

### *3.2 Indirect Expropriation Standard*

The modernised text contains a number of improvements in substantive standards on investment protection and procedural provisions.[107] In the context of supply-side energy policies substantive rules on indirect expropriation will be the most critical for violation and providing a basis for compensation.[108] Energy transition alone should not give rise to a violation of the FET standard unless the state has made prior commitments to investors with carbon-based investments that are inconsistent with the measures at stake. Moreover, the right to regulate to achieve legitimate policy objectives' that expressly mention climate change mitigation and adaptation is reaffirmed in a new stand-alone provision of the modernised treaty.

The modernised ECT provides an explanation of what constitutes indirect expropriation and what does not. It contains a list of factors that should be considered to assess indirect expropriation claims, including the economic impact and the character of the contested measure. The general rule provides that non-discriminatory measures that are designed and applied to protect legitimate policy objectives, including with respect to climate change mitigation and adaptation, do not constitute indirect expropriation, except in rare circumstances where the impact of the measure is so severe in light of its purpose that it is manifestly excessive.[109] The definition establishes a high threshold in order for a climate measure to constitute expropriation and to be so proved by the investor.

---

105 CONSEIL POUR LE CLIMATE (n 5) pp. 10–11.

106 EUROPEAN PARLIAMENT (n 3) paras 7–8.

107 The amendments also include definitions of investment and of investor, most constant protection and security, removal of non-derogation clause, denial of benefits, most-favoured-nation, umbrella clause and procedural matters concerning transparency, frivolous claims, security for costs, third-party-funding and valuation of damages.

108 JARRETT, Martin. Implementing the energy transition in the face of investment protection standards. In CAMERON, Peter D et al (ed). *The global energy transition: law, policy and economics for energy in the 21st century*, Hart Publishing, 2021, pp. 217–240.

109 Modernised agreement (n 1) art 13(4) Expropriation.

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

## 4 Conclusion

As the global community seeks to address and mitigate the impacts of climate change, the concept of a just transition has gained traction, highlighting the importance of equitable and inclusive processes that uphold human rights during societal transformations. While the concept is used and evolving with respect to energy transition measures at the national level, its use in the international investment treaties remain less understood.

While the need for decarbonisation of the energy sector has been recognised, only recently has there been a surge in interest in supply-side climate policy. Measures such as phasing out fossil fuel-based power generation or banning oil drilling directly affect relations between investors and states, and coal phase-out measures are already subject to international investment claims. Given that the ECT's protection covers vast foreign energy investments along the entire supply chain and with respect to all energy sources, the impacts are far-reaching.

The implementation of state's commitments under the Paris Agreement concerning emission reductions occurs at the national level. The nature and scope of measures to move away from fossil fuels are at the broad discretion of national governments, which in their practice increasingly recognise the concept of a just transition as a guiding principle ensuring that transition does not create disproportionate burdens on some individuals and groups. European countries have taken different approaches to energy transition commitments regarding timing, types of measures, and dealing with the consequences of phasing out fossil fuel-based power generation. On the one hand, Germany resolved the resulting compensation disputes by making settlement payments to the owners of affected nuclear and coal-fired power plants and minimized engagement of international investment treaties. The Netherlands, on the other hand, has been in dispute with affected plant owners over adequate compensation, including investment arbitrations initiated by German investors.

The reformed ECT incorporates provisions to exclude protection for existing fossil fuel investments on the basis of a voluntary flexibility mechanism to enable transition to low-carbon energy sources. The suggested approach would provide for the protection of all existing fossil investments in the EU and the UK until at the latest 2032 and would indefinitely protect existing and new fossil investments in ECT contracting parties outside the flexibility mechanism. Compared to existing bilateral investment treaties, the proposed amendments to the ECT[110] represent progress regarding supply-side policies, including the option for a carve-out of fossil fuel investments, reserving policy space for climate change mitigation and adaptation, and shielding provisions clarifying non-discriminatory climate regulation from expropriation claims.[111] On the other hand, the reform lacks

110 The article refrains from addressing procedural provisions and ISDS.

111 The utility of the narrowed treaty standards for renewables investors that continue to be protected under the modernised ECT is though doubtful. See eg TROPPER, Johannes, WAGNER, Kilian. The European Union Proposal for the Modernisation of the Energy Charter Treaty–A Model for

a holistic approach to phasing out of fossil fuels. For example, it does not address impacts of energy transition on developing countries and capacity building, which would ensure a transition to be just among countries.

The research for this article was supported by the Joint Programming Initiative "Connecting Climate Knowledge for Europe" (JPI Climate) within the SOLSTICE project ID 261 "Socially Just and Politically Robust Decarbonisation: A Knowledge Base and Toolkit for Policymakers" (JUSTDECARB).

## List of references

Books

DOOREY, David J., EISENBERG, Ann. Epilogue: The Contested Boundaries of Just Transitions. In CHACARTEGUI, Jávega, Consuelo (ed). *Labour law and ecology*. ARANZADI/CIVITAS, 2022;

JARRETT, Martin. Implementing the energy transition in the face of investment protection standards. In CAMERON, Peter D et al (ed). *The global energy transition: law, policy and economics for energy in the 21st century*, Hart Publishing, 2021, pp. 217–240;

MUINZER, Thomas L. Conceptualising and Formulating National Climate Change Acts. In MUINZER, Thomas L. (ed). *National Climate Change Acts: The emergence, form and nature of national framework climate legislation*. Bloomsbury Publishing, 2020;

VAN CALSTER, Geert, REINS, Leonie (ed). *The Paris agreement on climate change: A commentary*. Edward Elgar Publishing, 2021;

VIÑUALES, Jorge E. *The International Law of Energy.* Cambridge University Press, 2022.

Articles

BANG, Guri, ROSENDAHL, Knut Einar, BÖHRINGER, Christoph. Balancing cost and justice concerns in the energy transition: comparing coal phase-out policies in Germany and the UK. *Climate Policy*, 2022, vol. 22, issue 8, 1000–1015;

BURKE, Anthony, FISHEL, Stefanie. A coal elimination treaty 2030: Fast tracking climate change mitigation, global health and security. *Earth System Governance*, 2020, vol. 3, 100046;

EISENBERG, Ann M. Just transitions. *Southern California Law Review,* 2018, vol. 92, 2, pp. 273–330;

JOHANSSON, V. Just Transition as an Evolving Concept in International Climate Law. *Journal of Environmental Law*, 2023, eqad017;

MCCAULEY, Darren, HEFFRON, Raphael. Just transition: Integrating climate, energy and environmental justice. *Energy Policy*, 2018, 119, pp. 1–7;

NEWELL, Peter, VAN ASSELT, Harro, DALEY, Freddie. Building a fossil fuel non-proliferation treaty: Key elements. *Earth System Governance*, vol. 14, 100159, 1;

PELLEGRINI, Lorenzo et al. Institutional mechanisms to keep unburnable fossil fuel reserves in the soil. *Energy Policy*, 2021, no. 149, 112029;

SELIVANOVA, Yulia S. Changes in Renewables Support Policy and Investment Protection under the Energy Charter Treaty: Analysis of Jurisprudence and Outlook for the Current Arbitration Cases. *ICSID Review*, 2018, vol. 33, issue 2, pp. 433–455;

---

Climate-Friendly Investment Treaties? *The Journal of World Investment & Trade*, 2022, vol. 23, issue 5–6, pp. 813–848.

SIMÕES, Fernando Dias. When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking. *Denver Journal of International Law and Policy*, 2017, vol. 45, pp. 251–285;
TIENHAARA, Kyla et al. Investor-State dispute settlement: obstructing a just energy transition. *Climate Policy*, 2023, vol. 23, issue 9, pp. 1197–1212;
TROPPER, Johannes, WAGNER, Kilian. The European Union Proposal for the Modernisation of the Energy Charter Treaty–A Model for Climate-Friendly Investment Treaties? *The Journal of World Investment & Trade*, 2022, vol. 23, issue 5–6, pp. 813–848;
VAN AAKEN, Anne. Investment Law in the Twenty-First Century: Things Will Have to Change in Order to Remain the Same. *Journal of International Economic Law*, 2022, 1–11;
VAN ASSELT, Harro. Governing fossil fuel production in the age of climate disruption: Towards an international law of 'leaving it in the ground'. *Earth System Governance*, 2021, vol. 9, 100118, 1;
VAN ASSELT, Harro, GREEN, Fergus. COP26 and the dynamics of anti-fossil fuel norms. *Wiley Interdisciplinary Reviews: Climate Change*, 2022, e816;
VERBEEK, Bart-Japp. The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises? *Business and Human Rights Journal,* 2023, 1–6.

Electronic sources

BOHMER, Lisa. Dutch government announces intention to withdraw from Energy Charter Treaty, *Investment Arbitration Reporter*, 18 October 2022;
BOHMER, Lisa. Another EU state announces its withdrawal from the ECT, as EU Commission stands its ground. *Investment Arbitration Reporter,* 10 November 2022;
BOHMER, Lisa. Vattenfall asks for discontinuance of ICSID arbitration against Germany, after settlement enters into force. *Investment Arbitration Reporter,* 2 November 2021;
BOHMER, Lisa. Dutch court declines RWE's and Uniper's damages claims prompted by the Netherland's coal phase-out, seeing no violation of human rights instruments; parallel ICSID arbitrations remain suspended. *Investment Arbitration Reporter*, 30 November 2022;
BRAUCH, Martin Dietrich. The Agreement in Principle on ECT "Modernization": A Botched Reform Attempt that Undermines Climate Action. *Kluwer Arbitration Blog*, 17 October 2022;
CAMBRIDGE RESEARCH GROUP ON FOREIGN INVESTMENT AND THE ENVIRONMENT. OECD Public Consultation on Investment Treaties and Climate Change. Response paper. [online]. Available at: < https://www.oecd.org/investment/investment-policy/OECD-investment-treaties-climate-change-consultation-responses.pdf> Accessed 30.11. 2023;
CHARLOTIN, Damien. The latest EU state to leave the Energy Charter Treaty: Luxembourg. Investment Arbitration Reporter, 18 November 2022;
CONSEIL POUR LE CLIMATE. Report on the Modernisation of the Energy Charter Treaty [online]. Available at: < https://www.hautconseilclimat.fr/wp-content/uploads/2022/10/2022-10-19-TCE_HCC_EN.pdf> Accessed: 30.11.2023;
INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC). Summary for policymakers. In *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*. World Meteorological Organization, Geneva, 2018;
INTERNATIONAL ENERGY AGENCY. *Net Zero by 2050: A Roadmap for the Global Energy Sector*. [online]. Available at: < iea.li/nzeroadmap> Accessed 30.11. 2023;
INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT. *Newly Released Text for Modernized Energy Charter Treaty Shows Too Many Potential Obstacles for Climate Action*. [online]. Available at: <https://www.iisd.org/articles/statement/newly-released-text-modernized-energy-charter-treaty> Accessed 28.02. 2023.
IPP, Anja, MAGNUSSON, Annette, KJELLGREN, Andrina. The Energy Charter Treaty, Climate Change and Clean Energy Transition. A Study of the Jurisprudence. [online]. Available at: <

https://www.climatechangecounsel.com/_files/ugd/f1e6f3_d184e02bff3d49ee8144328e6c45215f.pdf> Accessed 30.11. 2023. A study of ECT awards issued up to August 2021;
MATHIESEN, Karl. Spain pulls out of energy treaty over climate concerns. *Politico,* 12 October 2022;
MATHIESEN, Karl. France to leave Energy Charter Treaty, says Macron. *Politico*, 21 October 2022;
PUTTER, Stan. The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations. *Kluwer Arbitration Blog*, 24 August 2021;
TIETJE, Christian. Der Energiecharta-Vertrag im Kreuzfeuer der Kritik. Ist der Rücktritt vom Energiecharta-Vertrag wirklich ein großer Wurf der Ampelkoalition?' *Verfassungsblog*, 15 November 2022;
UNITED NATIONS. *The Race to Zero Emissions, and Why the World Depends on It?* [online]. Available at: <https://news.un.org/en/story/2020/12/1078612> Accessed 30.11. 2023.

Other sources

CANADA NDC 2021. [online]. Available at: <https://unfccc.int/sites/default/files/NDC/2022-06/Canada%27s%20Enhanced%20NDC%20Submission1_FINAL%20EN.pdf > Accessed 30.11. 2023.
COUNCIL OF THE EUROPEAN UNION. Negotiating Directives for the Modernisation of the Energy Charter Treaty – Adoption (2 July 2019) 10745/19 ADD 1;
COUNCIL OF THE EUROPEAN UNION. Submission to the UNFCCC on Behalf of the European Union and Its Member States on the Update of the Nationally Determined Contribution of the European Union and Its Member States, 2020, 14222/1/20 REV 1;
DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY. Press release UK strengthens protections for taxpayers in energy treaty negotiations. [online]. Available at: <https://www.gov.uk/government/news/uk-strengthens-protections-for-taxpayers-in-energy-treaty-negotiations> Accessed 30.11. 2023;
ECT SECRETERIAT. Written notifications of withdrawal from the Energy Charter Treaty. [online]. Available at: <https://sciendo-parsed-data-feed.s3.eu-central-1.amazonaws.com/ICLR/Instructions_for_Authors.pdf > Accessed: 30.11. 2023;
ECT SECRETARIAT. Statement by the Secretary General of the Energy Charter Secretariat on the draft Council Decision proposing the withdrawal of the European Union from the Energy Charter Treaty dated 11 July 2023. [online]. Available at: < https://www.energycharter.org/media/news/article/statement-by-the-secretary-general-of-the-energy-charter-secretariat-on-the-draft-council-decision-p/> Accessed: 30.11. 2023;
EGYPT NDC 2022. [online]. Available at: <https://unfccc.int/sites/default/files/NDC/2022-07/Egypt%20Updated%20NDC.pdf.pdf> Accessed 30.11. 2023.
EUROPEAN COMMISSION. Press Release Agreement in principle reached on Modernised Energy Charter Treaty. [online]. Available at: <https://policy.trade.ec.europa.eu/news/agreement-principle-reached-modernised-energy-charter-treaty-2022-06-24_en> Accessed: 30.11. 2023;
EUROPEAN COMMISSION. Commission communication of 11 December 2019 on the European Green Deal' (2019) COM(2019)0640;
EUROPEAN PARLIAMENT. Resolution on the outcome of the modernisation of the Energy Charter Treaty dated 24 November 2022, 2022/2934(RSP);
GERMANY'S MINISTRY FOR ECONOMIC AFFAIRS AND CLIMATE ACTION. Press Release. Bundeskabinett fasst wichtige Zukunftsbeschlüsse. [online]. Available at: <https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/11/20221130-habeck-bundeskabinett-fasst-wichtige-zukunftsbeschlusse.html> Accessed: 30.11.2023;
INTERNATIONAL LABOUR ORGANIZATION. Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All. Geneva: ILO, 2015;

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)

OECD. OECD' s initiative on the Future of Investment Treaties. [online]. Available at: < https://www.oecd.org/investment/investment-policy/investment-treaties.htm Accessed: 30.11. 2023;

SECRETARIAT UNFCCC. Nationally determined contributions under the Paris Agreement – Synthesis Report by the Secretariat dated 17 September 2021, FCCC/PA/CMA/2021/8 paras 15.

UK UPDATED NATIONALLY DETERMINED CONTRIBUTION. [online]. Available at: < https://unfccc.int/sites/default/files/NDC/2022-09/UK%20NDC%20ICTU%202022.pdf > Accessed 30.11. 2023.

Update of Norway's nationally determined contribution. [online]. Available at: < https://unfccc.int/sites/default/files/NDC/2022-11/NDC%20Norway_second%20update.pdf> Accessed 30.11. 2023.

Cases

Judgment of the Federal Constitutional Court (6 December 2016), BVerfGE 143, 246, paras 1–2 and 4.

Order of the Federal Constitutional Court (29 September 2020), 1 BvR 1550/19;

*RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No ARB/21/4;

*Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v Kingdom of the Netherland*, ICSID Case No ARB/21/22;

*Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v Federal Republic of Germany*, ICSID Case No ARB/09/6, Award (11 March 2011);

*Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12, Discontinuance Order (9 November 2021).

Published by Palacký University Olomouc, Czech Republic, 2024.
ISSN 1213-8770 (print); ISSN 2464-6601 (online)