THE ENERGY CHARTER TREATY, CLIMATE CHANGE AND CLEAN ENERGY TRANSITION

A Study of the Jurisprudence

CLIMATE CHANGE COUNSEL

Authors
Anja Ipp, Annette Magnusson and Andrina Kjellgren

This report is a product of independent research by Climate Change Counsel (CCC), a small think-and-do-tank with a mission to mobilize the law and lawyers for climate action. For more information, visit www.climatechangecounsel.com.

The research was funded by the Foundation for International Law for the Environment (FILE).

CONTENTS

EXECUTIVE SUMMARY

The ECT in the Net Zero era

• The ECT is a multilateral treaty that protects foreign investments in the energy sector regardless of energy source. It requires the host state to provide investors Fair and Equitable Treatment ("FET"), protection from unreasonable or discriminatory measures, and compensation for direct or indirect expropriation. Investors can seek damages for breach of these protections through investor-state arbitration.

• Since 2018, the ECT member states have been engaged in negotiations to revise the treaty. Many members perceive a need to align the ECT with global climate goals and state commitments under the Paris Agreement.

• All ECT member states have signed the Paris Agreement and have committed to reducing carbon emissions. Laws and regulations passed to reduce emissions may have an adverse impact on foreign investments in the fossil-based energy sector. As a result, many anticipate a wave of "phase-out cases" under the ECT. The first such cases were filed against The Netherlands in 2021.

About the study

• This report is based on a review of 64 (of 75 known) arbitral awards rendered under the ECT before August 2021. The study aimed to map climate and energy transition issues in the ECT jurisprudence and to assess how tribunals have weighed the ECT investor protections against other treaties and against the state's right to regulate. It also looked at the role of *amicus curiae* in disputes under the ECT.

• The purpose of the study was to better comprehend the ECT's effect on energy transition to date, and to hypothesize, based on the jurisprudence, how tribunals may approach fossil phase-out cases.

Climate issues in ECT awards

• The ECT contains provisions on sustainability, renewable energy, and coordination of energy policy. The treaty's preamble refers to energy efficiency, environmental concerns, and mentions the UN Framework Convention on Climate Change. These provisions have not played any significant role in investor-state disputes to date.

• Of the 64 awards reviewed, 20 related to fossil-based energy investments. These awards did not touch upon policy issues related to energy transition, climate change, or obligations under climate law. 34 awards related to investments in renewable energy. All but two were claims challenging the host states' revisions to previously implemented incentive schemes.

• Despite the long-recognized connection between the energy sector and global warming, climate change and energy transition are generally absent from the ECT jurisprudence. None of the 64 reviewed awards discussed climate change in substance. Where the concepts of climate change and energy transition appeared, they did so as part of the background, not the analysis.

Interaction between the ECT and other treaties

• Article 26(6) ECT requires tribunals to decide investor claims in accordance with applicable rules and principles of international law. Similarly, Article 31(3)(c) of the Vienna Convention on the Law of Treaties requires tribunals to interpret any treaty taking into account "any relevant rules of international law."

• No tribunal has considered international climate law when interpreting the ECT's investment protections.

• The only other treaty that ECT tribunals have considered is the Treaty on the Functioning of the European Union (TFEU). One tribunal found that EU law prevails over the ECT in intra-EU disputes, but several others reached opposite conclusions. Their reasoning was based on Article 16 ECT, which stipulates that the investor protections prevail over conflicting provisions in other treaties. It remains to be seen which approach will have traction in fossil phase-out disputes.

• Some ECT tribunals have applied international law as a *fact* in the analysis of the FET standard. In these cases, requirements under EU law were considered in determining whether the state acted reasonably and whether the investor was entitled to legitimate expectations of regulatory stability. In future fossil-phaseout disputes, the host state's obligations under international or EU climate law may be similarly relevant.

• Many tribunals confirm that precedent has no binding effect in ECT arbitration, but most follow established interpretations of investor protection provisions.

Investor protections vs. states' right to regulate

• None of the 64 awards weighed the ECT investor protections against a host state's right to regulate for climate or energy transition. There is thus no direct precedent under the ECT for future investor claims challenging fossil-fuel phaseout regulations.

• 40 awards related to investor claims challenging the host state's introduction, amendment, or abolition of a regulatory measure. In these "regulatory disputes," investors typically allege that the regulation breached the FET standard, or that it amounted to an indirect expropriation ("regulatory taking") or an unreasonable or discriminatory measure.

• Tribunals have consistently set a high threshold for indirect expropriation. Where the investor remained in control of the investment, and the investment continued to generate *some* revenue, the claims have failed.

• Under the FET standard, the analysis has centered on whether the challenged measure breached the investor's "legitimate expectations" that the legal framework would remain unchanged. Some tribunals held that such expectations can only be based on a specific commitment of stability. Others found that expectations can be based on other circumstances, and weighed the public policy objective of the regulatory measure against the interests of the foreign investor. It remains to be seen which school of thought will gain traction in climate-related disputes, including if and how future tribunals will assign weight to emissions reduction as a public policy objective.

• Most tribunals have held that investors must conduct some level of due diligence to claim legitimate expectations of legal stability. Regulatory changes that were foreseeable at the time of investment have been held not to breach the FET standard. The foreseeability of the challenged regulatory measures is likely to be an issue in fossil phase-out cases, in light of state obligations under international climate law.

Amicus curiae in ECT arbitrations

• In disputes under the ECT, the only third party to participate as *amicus curiae* has been the European Commission (on issues of jurisdiction). The application in 2021 of several NGOs to intervene in a fossil phase-out case against the Netherlands may signal a shift in ECT arbitration practice. Under other investment treaties, NGOs or other public interest actors regularly intervene to alert the tribunal to the environmental, human rights and public health aspects or impact of the dispute.

Learnings from the jurisprudence

• Different stakeholders may draw different conclusions from the study findings. The last section of this report suggests a series of possible conclusions from the perspective of states, investors, arbitrators, and civil society.

1. INTRODUCTION

Nowhere is the fault line between climate law and investment protection more clearly visible than in the energy sector. On one side, obligations under climate treaties requires countries to pass regulatory measures to phase out fossil fuels and transition to low-carbon energy sources. On the other side, the implementation of such regulatory measures may trigger claims under an established system of investment treaties that shields foreign investors from the negative effects of certain state conduct.

The Energy Charter Treaty (ECT) protects foreign investments in the energy sector regardless of energy source; the Treaty does not distinguish between fossil-based and renewable energy. Since 2011, the ECT has seen a wave of investor-state arbitration claims challenging amendments to previously enacted incentive schemes in the renewable energy sector. Many now anticipate a similar wave of claims by investors in the fossil-based energy sector, as countries pass new laws and regulations to phase out fossil fuels and meet their obligations under international climate law. The first such "phase-out cases" under the ECT were filed against The Netherlands in 2021.

The present study was conducted by Climate Change Counsel to review climate-related issues in arbitral awards rendered under the ECT. The purpose is to better comprehend the Treaty's effect on energy transition; to contribute to the ongoing effort to revise the ECT; and to hypothesize, based on the jurisprudence, how tribunals may reason in the anticipated wave of fossil phase-out cases.

To this end, the study set out to assess:

- Climate and energy transition issues. Have tribunals applied the ECT environmental provisions, or considered issues related to climate change and energy transition? To what extent and in what contexts?

- The interaction between the ECT and other treaties. Have tribunals considered treaties relating to climate or environment as applicable law? If not, how have tribunals weighed other treaties against the ECT?

- Investor protection vs. states' right to regulate. Have tribunals weighed investor protections against the host state's right to regulate for climate and energy transition? If not, can findings in other contexts inform or predict how future tribunals may decide climate-related cases?

- Amicus curiae. Have third-party stakeholders intervened to alert ECT tribunals to climate law obligations or issues of energy transition? If not, are there examples under other treaties where they have done so?

a. About the ECT

The ECT is arguably the most important of the bilateral and multilateral trade agreements that govern trade and cross-border investments in energy and energy-related transactions. Signed in 1994, the ECT resulted from an international effort to facilitate cross-border energy transactions following the end of the Cold War, and today has more than 50 state signatories from Europe, Central Asia, and other regions. In 2016, Italy became the first and only country to resign from the treaty, following a series of investor claims challenging changes to the country's renewable energy subsidy scheme. Australia, which had signed the ECT in 1994 but never ratified it, terminated its signature in late 2021. Russia signed the ECT in 1994 using the treaty's possibility of provisional application. In 2009, Russia terminated the provisional application and stated its intent not to become an ECT contracting party.

The ECT establishes a framework for cooperation in the energy industry, provides for free trade in energy products and freedom of energy transit, and aims to stimulate foreign direct investments. It includes certain investor protections that apply to all investments associated with "economic activity in the energy sector", regardless of whether the energy source is fossil-based or renewable. The ECT offers investors a choice of three fora for dispute resolution – national courts or tribunals, previously agreed methods of dispute resolution, or arbitration. Most, if not all, disputes under the treaty to date have been brought to arbitration.

The ECT is currently undergoing a thorough review, commonly referred to as the ECT modernization process (see section 1(c)

to align with the global climate goals and support the clean energy transition. Such a revision, spearheaded by the EU, would include amending the definition of protected investments to exclude investments associated with fossil-based energy sources.

b. The ECT in the Net Zero era

All ECT contracting parties are signatories of the Paris Agreement and members of the 1992 United Nations Framework Convention on Climate Change (UNFCCC). The Paris Agreement was concluded at COP21 in 2015 and has been ratified by 191 states and the European Union, representing over 98 percent of the world's emissions. In October 2021, Turkey became the latest country to ratify the Agreement – leaving only Iran, Eritrea, Libya, Yemen and Iraq as non-parties. This represents a near-universal global consensus on the goals embodied in the Paris Agreement: to limit global average temperature rise to "well below" 2°C, preferably 1.5°C, above pre-industrial levels, and to reach "net zero" carbon emissions by mid-century.[1]

Most parties to the Paris Agreement have set Nationally Determined Contributions (NDCs), as required by the treaty.[2] These typically aim to cut emissions significantly by 2030, and to achieve climate-neutrality or "Net Zero" carbon emissions by 2050. It is undisputed that reaching these targets will require steep reductions in greenhouse gas emissions across all sectors of the global economy. In the energy sector, an unprecedented overhaul of energy systems will be necessary, including most importantly the phasing out of fossil-based energy sources – coal, oil and gas.[3]

In May 2021, the International Energy Agency (IEA) released the report *Net Zero by 2050: A Roadmap for the Global Energy Sector*, which emphasized that reaching the Net Zero target requires: (1) a historic surge in clean-energy investment, (2)

[1] Article 2 of the Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 ("Paris Agreement").
[2] Paris Agreement, Article 4.2. Originally required every five years, as a result of the Glasgow Climate Pact, states shall now report updated NDCs annually.
[3] While the Paris Agreement does not mention the words "oil", "gas" and "coal", the Glasgow Climate Pact, the result of the 26th Conference of the Parties to the UNFCCC (COP26), included for the first time a commitment to phase out the use of unabated coal. During the meeting, more than 40 countries also pledged to move away from coal in the *Global Coal to Clean Power Transition Statement*, published on 2 November 2021. https://ukcop26.org/global-coal-to-clean-power-transition-statement/.

no investments in new fossil fuel supply projects, and (3) no further final investment decisions for new unabated coal plants. The IEA investment recommendations may be seen to stand in contrast to the ECT's protections of *all* investments in the energy sector, regardless of whether the energy source is fossil-based or renewable.

There is a broad spectrum of views on how the ECT fits into the context of the Paris Agreement and the clean energy transition. These views generally fall into the following broad categories:

- On one end of the spectrum, some observers claim that the current version of the ECT *supports* the energy transition by encouraging and protecting investments, including those in renewable energy, and by holding states accountable for regulatory changes, including those affecting the energy transition.

- Other observers state that an investment treaty is not the right place to implement global climate targets, and that the ECT therefore should remain technology-neutral and leave it up to governments to implement the necessary policies to achieve their desired energy mix.

- Critics of the ECT argue that the ECT hinders the energy transition by protecting fossil fuel investments and using tax money to compensate fossil investors. They maintain that investor disputes, and the threat of such disputes, cause a "regulatory chill" that restricts states' ability or willingness to implement laws and policies in support of clean energy transition.

Many ECT contracting parties have implemented or will soon implement policy measures to phase out fossil fuels and alter their energy mix, as a step toward meeting their Net Zero targets and obligations under the Paris Agreement. Such policy measures are likely to affect investments associated with fossil-based energy sources, and thus may give rise to claims under the ECT's investor protections. In 2021, such claims were filed against the Netherlands by German utility companies RWE and Uniper, challenging the state's 2019 "Law Prohibiting the Use of Coal for the Production of Electricity", which phases out all coal plants by 2030.[4]

Many observers anticipate that an increasing number of such "phase-out" claims will be filed under the ECT as states make changes in national regulations to phase out fossil fuels to meet their commitments under the Paris Agreement. This report explores how these cases may play out under the ECT, based on analogous cases and issues in the ECT jurisprudence to date.

[4] RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4; and Uniper Benelux N.V. v. Kingdom of the Netherlands, ICSID Case No. ARB/21/22. There is also a pending claim against Italy, in which a foreign investor challenged the Italian authorities' denial to grant the production concession for an oil and gas field. That case, however, is not primarily concerned with a regulation to phase out fossil fuels. See Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italian Republic, ICSID Case No. ARB/17/14.

TIMELINE OF INTERNATIONAL CLIMATE AGREEMENTS

1992 – United Nations Framework on Climate Change (UNFCCC)
An environmental framework treaty to combat dangerous human interference with the climate system, in part by stabilizing greenhouse gas concentrations in the atmosphere. Nearly universal participation.

1997 – Kyoto Protocol
Outlined obligations for developed countries to reduce emissions of greenhouse gas emissions. Also introduced mechanisms such as emissions trading, clean development mechanism and joint implementation.

2007 – Bali Action Plan
Set out a new negotiations process designed to tackle climate change. Centered on four main building blocks – mitigation, adaptation, technology and financing.

2010 – Cancun Agreements
Called for US$100 billion per annum for a Green Climate Fund, but the funding was not secured. Nor was a commitment to a second period of the Kyoto Protocol.

2012 – The Doha Amendment to the Kyoto Protocol
Contained a second commitment period of Kyoto Protocol from 2012 to 2020. Scope and application limited due to lack of widespread participation.

2015 – Paris Agreement
The first agreement uniting most of the international community behind the cause of combating climate change and adapting to its effects. Set the goal to limit global warming to "well below 2 degrees, preferably to 1.5 degrees Celsius, compared to pre-industrial levels."

2017 – Katowice Climate Package
Set out procedures and mechanisms to make the Paris Agreement operational. Established an international system for promoting and tracking countries' progress.

2021 – Glasgow Climate Pact
Includes, a commitment to phase out the use of unabated coal, a commitment to provide climate finance for developing countries, and an agreement to re-visit emission reduction plans in 2022 to keep the Paris Agreement target achievable.

c. The ECT modernization process

The ECT modernization process has been ongoing since 2017.[5] The state parties have undertaken extensive negotiations, including three rounds in 2020 and a total of seven rounds in 2021. According to most reports, the negotiations to date have not resulted in much progress toward agreement among the parties on revisions of the treaty text. Any amendment to the ECT must be unanimously approved, which means that any one of the ECT's contracting states can block a reform proposal – including states that have not engaged in the modernization negotiations.

A main driver of reform is the recognition among some of the contracting parties that significant changes are necessary to bring the ECT in line with the UNFCCC, the Paris Agreement, and the Sustainable Development Goals. The European Commission (EC) tabled an initial text proposal for a revised ECT in May 2020, and an updated proposal in February 2021. The EC proposal aims at the reform of investment protection and dispute settlement rules, as well as new provisions on sustainable development and climate change. One of the stated objectives of the EC proposal is to align the ECT with the Paris Agreement and the objectives of the European Green Deal.

In 2020-21, several contracting parties revealed that they are considering resigning from the ECT, citing frustration with the slow pace and lack of result of the modernization negotiations.[6] A complicating factor in any withdrawal from the ECT is that the

"A main driver of reform is the recognition among some of the contracting parties that significant changes are necessary to bring the ECT in line with the UNFCCC, the Paris Agreement, and the SDGs."

[5] A timeline of the modernization negotiations is available at https://www.energychartertreaty.org/modernisation-of-the-treaty/ (accessed 3 February 2022).
[6] It has been reported that Spain and France have called to exit the treaty. See, for example, https://www.clientearth.org/latest/latestupdates/news/eu-must-withdraw-from-energy-charter-treaty/ and https://www.reuters.com/legal/litigation/talks-reform-energy-pact-blocking-climate-action-face-failure-2021-07-06/ (accessed 10 December 2021).

treaty contains a "sunset clause" (in Article 47) whereby investments will enjoy continued protection for a period of 20 years, even after the host country has resigned from the treaty, or after the treaty has been terminated.

In 2020 and 2021, government ministers of several EU member states submitted formal letters to the EC criticizing the slow pace of the modernization process, voicing doubts that it will produce sufficient results, and calling for a coordinated EU withdrawal from the treaty if the reform efforts fail to align the treaty with the Paris Agreement.[7]

The European Commission has previously stated that the best possible outcome is to have a reformed ECT, because unilateral withdrawal of the EU and its member states from the ECT would trigger the sunset clause. The Commission has also stated, however, that "[i]f core EU objectives, including the alignment with the Paris Agreement, are not attained within a reasonable timeframe, the Commission may consider proposing other options, including the withdrawal from the ECT."[8]

State representatives interviewed for this study reported that many ECT contracting parties oppose the EU's proposed revisions and appear committed to maintaining the current text of the treaty – including the protection of *all* investments regardless of energy source. The interviewees also reported that several contracting parties have not participated in the modernization negotiations. Despite their non-participation in the negotiations, these states retain the ability to block any resulting reform proposal.

d. Recent developments limiting ECT application within the EU

A large part of investments protected by the ECT are intra-EU investments, meaning that an investor from one EU member state has invested in another EU member state. Of the 154 known claims filed under the ECT (as of 3 August 2021), 98 have

[7] *Letter from Spanish Government to European Commission regarding the Energy Charter Treaty Modernisation Process*, 9 February 2021, available at https://www.transnational-dispute-management.com/legal-and-regulatory-detail.asp?key=28116 (accessed 10 December 2021).
[8] *Parliamentary questions, Answer given by Executive Vice-President Dombrovskis on behalf of the European Commission*, 2 December 2020, available at https://www.europarl.europa.eu/doceo/document/P-9-2020-005555-ASW_EN.html (accessed 27 October 2021).

been intra-EU disputes. The compatibility between the ECT, investor-state arbitration and EU law has been a jurisdictional issue in many of these cases (see Section 6 below). Because this topic has long been a topic of research and debate, and because it is not unique to climate-related disputes, it is not discussed at length in this report.

In a judgment rendered on 2 September 2021, the Court of Justice of the European Union ("CJEU") held that intra-EU investment arbitration proceedings under the ECT are incompatible with EU law.[9] How the judgment will affect arbitration proceedings with an arbitral seat outside of the EU remains to be seen. Tribunals may find that EU law does not apply in such arbitrations, even if the parties are EU members. Even if the arbitral seat is outside of the EU, however, payment of an arbitral award relating to an intra-EU dispute could be considered by the EU to constitute unlawful state aid.[10]

[9] *Republic of Moldova v. Komstroy LLC* (Case C-741/19), Judgement of the Court of Justice of the European Union (Grand Chamber) (2 September 2021).
[10] See CIEL and ClientEarth, *The Future of Arbitration under the Energy Charter Treaty A legal briefing on the implications of the Komstroy decision for pending and future intra-EU investment disputes*, December 2021, available at https://www.clientearth.org/media/frmdmove/ciel-ce-legal-briefing-future-of-intra-eu-ect-arbitration-131221.pdf (accessed 15 January 2022).

2. METHODOLOGY AND LIMITATIONS

This study aimed to explore the interplay between the ECT, climate change and energy transition policy by reviewing the jurisprudence. To this end, the study was carried out in four phases:

1. A desk review and a series of stakeholder interviews were conducted to inform the review of the jurisprudence. The stakeholders interviewed included: state representatives involved in the ECT modernization negotiations; the ECT Secretariat; representatives of intergovernmental organizations, NGOs and think tanks; and lawyers with experience as arbitrator, counsel and tribunal secretary in ECT disputes.

2. Efforts were made to collect all 75 awards known to have been rendered under the ECT before 3 August 2021. Fifty-eight were available on the ECT Secretariat's website or other public databases, such as Jus Mundi (https://jusmundi.com) and italaw (www.italaw.com).[11] For awards not publicly available, attempts were made to extract information from the award in collaboration with the administering arbitral institution. This resulted in a collection of 64 of the 75 known awards. In bifurcated cases, i.e. where the final award addressed damages only, the review included any preceding partial award or decision on jurisdiction and liability.

3. All 64 awards were reviewed to collect basic information and conduct a search for keywords and expressions related to climate change, energy transition, and international law.

4. An in-depth review was conducted of approximately 35 awards, selected based on their relevance to energy transition policy, climate change, state obligations under other treaties, and the right to regulate. The review was conducted using a set of questions informed by the desk review and stakeholder interviews.

[11] Website of the ECT Secretariat, https://www.energychartertreaty.org/cases/list-of-cases/ (accessed 27 October 2021).

As with any research project, the study was subject to certain limitations, including (i) the inherent difficulty in reviewing a large body of jurisprudence in a relatively short time (August-November 2021); (ii) the inability to access or extract information from 11 of the 75 rendered awards due to confidentiality restrictions; and (iii) the difficulty of applying keywords consistently, considering that tribunals may use different expressions for the same concept.

Another limitation is that the study is limited to ECT awards, while tribunals in ECT cases refer interchangeably to cases under bilateral investment treaties ("BITs") and other investment agreements. The study therefore provides only a partial view of the jurisprudence relevant to future phase-out cases.

Finally, as emphasized by several stakeholders, the ECT's effect on the clean energy transition cannot be fully assessed by looking at arbitral awards alone – as this approach does not account for the "chilling effect" of settled or threatened arbitration claims. The full impact of the ECT on energy transition includes its role not only as a lobbying tool, but also as a model for other investment protection treaties, such as the Economic Community of West African States (ECOWAS) Energy Protocol. These aspects, while important, are beyond the scope of this study.

3. INVESTMENT PROTECTION UNDER THE ECT

Article 2 of the ECT states that the treaty's purpose is "to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter." The objectives of the 1991 European Energy Charter, to which Article 2 refers, include the development of trade, cooperation in the energy field, and energy efficiency and environmental protection.[12]

To meet these objectives, the signatories of the Charter agreed to "provide for a stable, transparent legal framework for foreign investments."[13] This is reflected in Part III of the ECT, which contains substantive protections for investors, and provides for investor-state dispute resolution.

Put simply, an investor from one ECT member state that make an energy-related investment in another ECT member state (the "host state") is protected against certain conduct or actions by the host state that negatively affect the investment. Investors may seek compensation for alleged violations of these protections by filing an arbitration claim.

a. Which investments are protected?

Part I of the ECT defines the scope of protected investments. Article 1(6) explains that "investment" means "every kind of asset, owned or controlled directly or indirectly by an Investor" and including, for example, tangible and intangible property; leases and mortgages; shares, stock, bonds or debt; claims to money and claims to performance; and rights or permits. To fall within the scope of the ECT protections, an investment must also be "associated with an Economic Activity in the Energy Sector" which under Article 1(5) means:

> *an economic activity concerning the exploration, extraction, refining, production, storage, land transport, transmission, distribution, trade, marketing, or sale of Energy Materials and*

[12] 1991 European Energy Charter, Title I: Objectives.
[13] 1991 European Energy Charter, Title II: Implementation.

Products except those included in Annex NI, or concerning the distribution of heat to multiple premises.

Exactly which "Energy Materials and Products" qualify for protection is explained in lengthy annexes to the ECT, based on the Harmonised System of the World Customs Organization and the Combined Nomenclature of the European Communities.

The definition of "Economic Activity in the Energy Sector" is a major topic in the ECT modernization negotiations. The EU proposal for a revised ECT amends the definition of "Energy Materials and Products" to exclude, over time, investments associated with fossil-based energy sources. To date, however, which investments are protected by the ECT and the extent to which they meet the criteria under Article 1(5) have not been important issues in investor-state disputes – possibly because the definitions have been very inclusive.

b. What are investments protected against?

Part III of the ECT contains the obligations that states assume under the ECT towards foreign investors. To bring a claim before an arbitral tribunal, investors must demonstrate a breach of these obligations. Part III requires the host state to provide investors:

- Fair and equitable treatment ("FET"),
- Full protection and security,
- Protection from unreasonable or discriminatory measures,
- Most-favoured-nation ("MFN") treatment, and
- Compensation for direct or indirect expropriation of the investment.

Investor claims relevant to energy transition, climate change and the right to regulate have primarily involved the FET standard, unreasonable or discriminatory measures, and indirect expropriation. These obligations and protections will also likely be central in disputes challenging fossil phase-out regulations. They stem from Article 10(1) and Article 13 of the ECT.

Article 10 Promotion, Protection and Treatment of Investments

(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.

Article 13(1) Expropriation

Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation (hereinafter referred to as 'Expropriation') except where such expropriation is: (a) for a purpose which is in the public interest; (b) not discriminatory; (c) carried out under due process of law; and (d) accompanied by the payment of prompt, adequate and effective compensation.

Fair and equitable treatment (FET)

Like many other investment treaties, the ECT does not define the FET standard. This means that the application of this provision requires counsel and arbitrators to establish standards for government conduct based on the facts and circumstances of the individual case. Tribunals have found it to include a requirement on the state to (1) protect the investor's *legitimate expectations*, (2) act with transparency, (3) accord due process, (4) refrain from arbitrary and discriminatory measures, and (5) ensure stable and equitable conditions. These components are discussed at length in Section 7 of this report.

Protection against unreasonable and discriminatory measures

Article 10(1) also provides that a state may not impair the management, maintenance, use, enjoyment or disposal of a foreign investment by means of "unreasonable or discriminatory measures". This standard is connected to, and potentially overlaps with, the FET principle, but is generally considered to constitute a separate protection. Tribunals have found that unreasonable and discriminatory measures are those not founded in reason or fact, or those that are disproportionate to the intended policy objective, and the impairment caused by the measure must be significant to constitute a breach.

Expropriation

The protection from expropriation is fundamental in investment treaties, and the source of much debate. Expropriation claims under the ECT typically do not involve outright takings of investments by the host state, but rather alleges indirect or "creeping" expropriation through regulatory or tax measures that undermine the operation or enjoyment of the investment. An expropriation can be lawful if carried out in accordance with the conditions set out in Article 13, including adequate compensation.

c. Where are investment disputes decided?

A foreign investor who thinks that the host state's conduct violates the protections provided in Articles 10 and 13 can bring a claim under Article 26 of the ECT. Investors have a choice of three dispute-resolution fora – (i) national courts or tribunals, (ii) previously agreed methods of dispute resolution, or (iii) arbitration under Article 26(4) ECT. Most, if not all, disputes under the ECT to date have been brought to arbitration.

Article 26(4), in turn, stipulates that investors may file their claims at the International Centre for the Settlement of Investment Disputes (ICSID), at the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), or as *ad hoc* proceedings under the UNCITRAL Arbitration Rules. Approximately two-thirds of all claims to date have been filed under the ICSID Rules, and the remainder is split between the SCC and the UNCITRAL Rules.[14]

[14] Available at https://www.energychartertreaty.org/cases/statistics/ (accessed 28 January 2021).

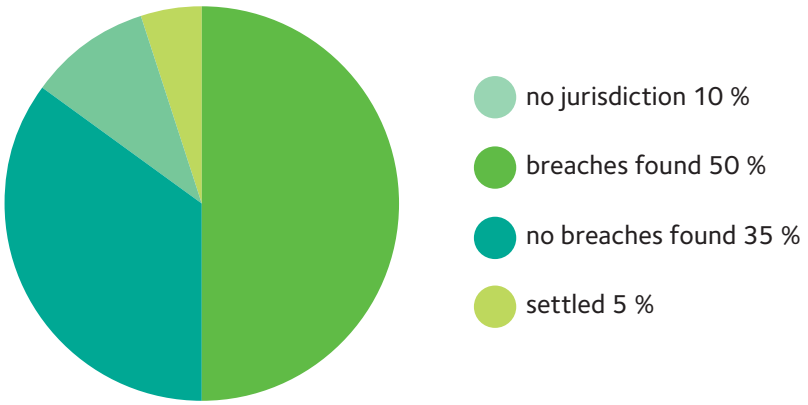
4. ECT JURISPRUDENCE AT A GLANCE

As of 3 August 2021, the cutoff date for this study, 75 arbitral awards were known to have been rendered under the ECT. One of those awards had been annulled, and 23 were pending annulment proceedings.[15] As explained in Section 2 above, this study was able to collect and review 64 of the 75 rendered awards.

Of the 64 awards reviewed, 20 were related to investments in fossil fuels (oil, gas or coal), while 34 related to investments in renewable energy sources (solar, wind, hydropower). Three awards related to nuclear energy. Some awards could not be attributable to a particular energy source.

While roughly one-third of the reviewed awards related to oil, coal or gas, they did not touch upon policy issues such as energy transition, climate change, or obligations under climate law. Rather, the disputes concern isolated issues stemming from denials of licenses, contractual breach, or discriminatory conduct.[16] In exactly half of the 20 awards, the tribunal found that the host state had breached the ECT investor protections.

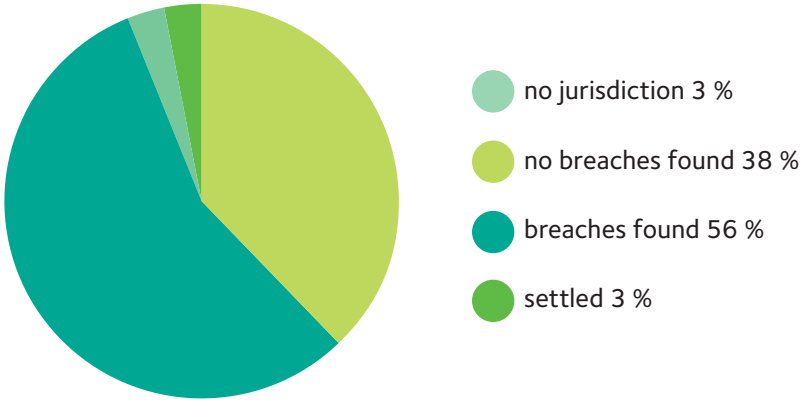
FIGURE 1: OUTCOME OF FOSSIL FUEL CASES (20 OF 64 AWARDS)



[15] Information available at https://www.energychartertreaty.org/cases/statistics/ (accessed 27 October 2021).
[16] Our study is limited to awards rendered, but we recognize that there have been additional claims challenging regulations relating to fossil energy sources, e.g. Vattenfall v. Germany in 2009 (coal, settled), Rockhopper v. Italy (offshore drilling, pending), and two current coal-phaseout cases against the Netherlands.

Of the 64 awards reviewed for this study, 34 related to investments in renewable energy. All but two of these cases were claims challenging the host states' revisions to previously implemented incentive schemes designed to encourage investment in the renewable energy sector (for more discussion of these cases, see Section 7 below). As illustrated in Figure 2, tribunals found breaches of ECT investor protections in 19 of the 34 awards related to renewable energy.

FIGURE 2: OUTCOME OF RENEWABLE ENERGY CASES (34 OF 64 AWARDS)



More statistics on rendered awards and filed claims are available on the website of the ECT Secretariat (https://www.energy-chartertreaty.org/cases/statistics/).

As of 3 August 2021, the cutoff date for this study, the ECT Secretariat was aware of 142 filed cases and 75 rendered awards under the ECT. The information compiled by the ECT Secretariat cannot be considered exhaustive, however, because parties are not obliged to notify the Secretariat of the existence of a dispute. Therefore, there may be arbitral proceedings and awards beyond those included in the ECT Secretariat's statistics.

5. CLIMATE-RELATED ISSUES IN ECT AWARDS

Have tribunals considered the ECT environmental provisions, climate change and energy transition in arbitral awards?

The connection between energy transition and meeting the global climate goals is well recognized. In the ECT modernization negotiations, allowing space for member states' climate- and energy transition policies has been a central feature. In that context, the present study sought to map the prevalence of issues related to energy transition and climate change in ECT awards.

The following sections look at the environmental provisions of the ECT itself, review how tribunals have applied those provisions in arbitral awards, and shows the extent to which tribunals have considered and discussed energy transition and climate change more broadly.

a. The ECT's environmental provisions

When the ECT was signed in 1994, the treaty's language on environmental protection and energy efficiency was unusual in international investment agreements. The ECT contains provisions on sustainability, environmental impact assessments, renewable energy, and coordination of energy policy among signatory states. These are included in the treaty's Preamble, in Article 19 and 24(2), and in the Protocol on Energy Efficiency and Related Environmental Aspects.[17]

The Preamble has 15 paragraphs, three of which concern environmental matters:

- Paragraph 12: "Recognising the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy;"

- Paragraph 13: "Recalling the United Nations Framework Convention on Climate Change [UNFCCC], the Convention

[17] For further discussion, see Aapo Heinäsmäki, *The Environmental Aspects of the Energy Charter Treaty and their Significance in Litigation*, Master's thesis, University of Helsinki, August 2020. Available at https://helda.helsinki.fi/bitstream/handle/10138/318641/Heinasmaki_Aapo_Master%27s%20Thesis_2020.pdf (accessed 18 November 2021).

on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects;"

- Paragraph 15: "Recognizing the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal, and for internationally-agreed objectives and criteria for these purposes."

Article 19 contains the environmental aspects of the treaty. It requires states to "strive to" minimize the harmful environmental impacts of energy operations, to formulate and implement energy policies in a way that accounts for environmental considerations, to develop and use renewable energy sources, and promote the use of cleaner fuels. Article 19 also specifically refers to the obligations of contracting parties under international agreements concerning the environment. Article 19 imposes no obligations on investors.

Arbitral tribunals formed under Part III of the ECT do not have jurisdiction to hear disputes based on Article 19, which falls in Part IV of the Treaty. Instead, Article 19(2) provides that disputes that arise under this article should be resolved by "other appropriate international fora" or the Energy Charter Conference, at the request of a contracting state.

Article 19 Environmental Aspects (relevant excerpts)

(1) In pursuit of sustainable development and taking into account its obligations under those international agreements concerning the environment to which it is party, each Contracting Party shall strive to minimise in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area, taking proper account of safety. In doing so each Contracting Party shall act in a Cost-Effective manner. In its policies and actions each Contracting Party shall strive to take precautionary measures to prevent or minimise environmental degradation. The Contracting Parties agree that the polluter in the Areas of Contracting Parties, should, in principle, bear the cost of pollution, including trans-boundary pollution, with due regard to the public interest and without distorting Investment in the Energy Cycle or international trade. Contracting Parties shall accordingly:

(a) take account of environmental considerations throughout the formulation and implementation of their energy policies; . . .

(d) have particular regard to Improving Energy Efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and to employing technologies and technological means that reduce pollution; . . .

(2) At the request of one or more Contracting Parties, disputes concerning the application or interpretation of provisions of this Article shall, to the extent that arrangements for the consideration of such disputes do not exist in other appropriate international fora, be reviewed by the Charter Conference aiming at a solution.

(3) [Definitions]

Article 24(2) provides that "The provisions of this Treaty . . . shall not preclude any Contracting Party from adopting or enforcing any measure . . . necessary to protect human, animal or plant life or health". That provision, however, specifically does not apply to the investor protections in Part III of the treaty. In *RWE Innogy v.* Spain, the Tribunal confirmed regarding Article 24(2):

> *The impact of this complex provision is that while, as a general rule, the provisions of the Treaty do not preclude the adoption or enforcement of measures 'necessary to protect human, animal or plant life or health', the provisions of Part III of the ECT – which includes Article 10(1) [on investor protections] – are not included within that general rule.*[18]

The Claimants in the case argued that because the exception established by Article 24(2) with respect to measures "necessary to protect human, animal or plant life or health" does not apply to the investor protection provisions, the ECT drafters intended for investor protection to be prioritized over such matters.[19] The tribunal rejected this line of argument.[20]

The Protocol on Energy Efficiency and Related Environmental Aspects ("the Protocol") was negotiated and opened for signature in parallel with the Treaty. It is a legally binding part of the ECT framework for the states that have ratified it, which the vast majority of the contracting parties has done. Similar to Article 19, the Protocol contains "soft" obligations requiring participating states to "strive to" formulate policy aims for improving energy efficiency and reducing the energy cycle's negative environmental impact. The Protocol provides a menu of good practices, and establishes a forum for contracting parties to cooperate on matters related to energy efficiency. The Protocol imposes no obligations on investors.

b. Discussion of the ECT's environmental provisions in arbitral awards

It appears from the preambular language, Article 19 and the Protocol that environmental protection and the promotion of energy efficiency was an explicit objective of the ECT.

[18] RWE Innogy GmbH and RWE Innogy Aersa S.A.U v. Kingdom of Spain, ICSID Case No. ARB/14/34, Award (18 December 2020), para. 445.
[19] Id. at 415.
[20] Id. at 446.

Nearly three decades have passed since the ECT was drafted. In this period, there has been an upsurge in global environmental and climate law and policy – the Kyoto Protocol in 1997 and the Paris Agreement and the Sustainable Development Goals in 2015 – and the number of climate-related laws on the national level has skyrocketed.[21] The Intergovernmental Panel on Climate Change (IPCC) has issued increasingly alarming scientific assessments on the risks and implications of climate change, and the International Energy Agency (IEA) has established that reaching the global climate targets require the immediate curtailment of fossil fuel investments. These developments help explain why many states parties are pushing for ECT modernization.

Despite these developments, the ECT's environmental provisions have not received much attention, neither in disputes under the treaty nor in the debate over the ECT's role in the clean energy transition. In the 64 awards reviewed for this study (of 75 known awards rendered under the ECT), not one award mentioned the Protocol on Energy Efficiency and Related Environmental Aspects and only four awards mentioned Article 19.

In *Blusun v. Italy*, the tribunal confirmed that Article 19 does not place any obligations on investors. Italy argued that the claimants had infringed the principle of good faith by evading their obligation to request an Environmental Impact Assessment (EIA) in violation Article 19. The claimants objected that Article 19, contained in Part IV of the ECT, were beyond the scope of the tribunal's jurisdiction, which is confined to Part III. Ultimately, the tribunal concluded that "Article 19 operates not at the level of individual investors but at the interstate level. . . . In so far as there is any requirement for private parties to carry out an EIA for any proposed project, this can only arise under the relevant national law."[22]

Article 19 and the preambular language concerning climate and environment were also mentioned in three awards in disputes involving renewable energy investments in Spain.

- In *Eiser v. Spain*, the tribunal cited Article 19 in explaining the purpose of the ECT: "the ECT's emphasis on developing secure long-term energy cooperation is coupled with provisions

[21] Climate Change Laws of the World, Grantham Research Institute on Climate Change and the Environment, https://climate-laws.org/ (accessed 18 November 2021).
[22] Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award (27 December 2016), para. 275.

addressing the environmental aspects of energy development."[23]

- In *NextEra Energy v. Spain*, the investors explicitly argued that the FET standard should be applied "in light of . . . the environmental protection goals explicitly identified in the ECT's Preamble, Article 2 and Article 19." Spain responded that that "the purpose of the ECT is stated in Article 2, and that Article 19 on environmental protection is of minor importance."[24] The tribunal did not opine on the issue.

- In *Stadtwerke Munchen v. Spain*, Article 19 was briefly mentioned in the background section, which cited several ECT provisions on energy efficiency to describe the context in which Spain implemented its incentives scheme for renewable energy investments.[25]

c. Discussion of climate change and energy transition in arbitral awards

Looking beyond the environmental provisions of the treaty itself, the study also reviewed whether tribunals have considered and discussed issues related to energy transition and climate change more generally.

Only one of the 64 reviewed awards used the exact phrase "energy transition." Several more discussed the concept in other words, most frequently in the background to the renewable energy cases. Although these awards clearly relate to the host state's energy transition policy – of which the incentive schemes were part – the issues typically before the tribunal relate to budgetary concerns and rising consumer cost as justification for the state's regulatory action.

None of the 64 reviewed awards discussed climate change in any substance. There were 13 mentions of the phrase "climate change" in the jurisprudence. Twelve awards mentioned UNFCCC, but only as a cursory mention as part of the framework in which states have implemented incentive schemes for renewable energy

[23] C Eiser Infrastructure Limited and Energia Solar Luxembourg S.À.R.I. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award (4 May 2017), para. 99-100.
[24] NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Principles of Quantum (12 Mar 2019), para. 408.
[25] Stadtwerke München GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award (2 December 2019), para. 52.

investments. For example:

- "Against the background of the 1992 UN Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol to the UNFCCC, the European Union adopted legislation committing Member States, including Spain, to reduce greenhouse gas emissions." (OperaFund v. Spain, ICSID Case No. ARB/15/36, Dissenting Opinion by Arbitrator Philippe Sands (13 August 2019), para. 5.)

- "The Electricity Act 54/1997 was implemented by a series of Royal Decrees, following Spain's signature in April 1998 of the Kyoto Protocol to the United Nations Framework Convention on Climate Change, which required the contracting parties to reduce greenhouse gas emissions and set binding emission targets to achieve reduction." (Hydro Energy v. Spain, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020), para 79.)

- "This policy furthered Spain's international commitments and obligations set out, among others, in the directives of the European Union and the Kyoto Protocol." (InfraRed v. Spain, ICSID Case No. ARB/14/12, Award (2 August 2019), para. 3.)

These and similar background mentions are the only occurrences of climate change in the jurisprudence. As demonstrated in Figure 3, phrases commonly associated with energy transition and climate change appeared in relatively few awards. Several other keywords did not appear in any of the 64 reviewed awards.[26]

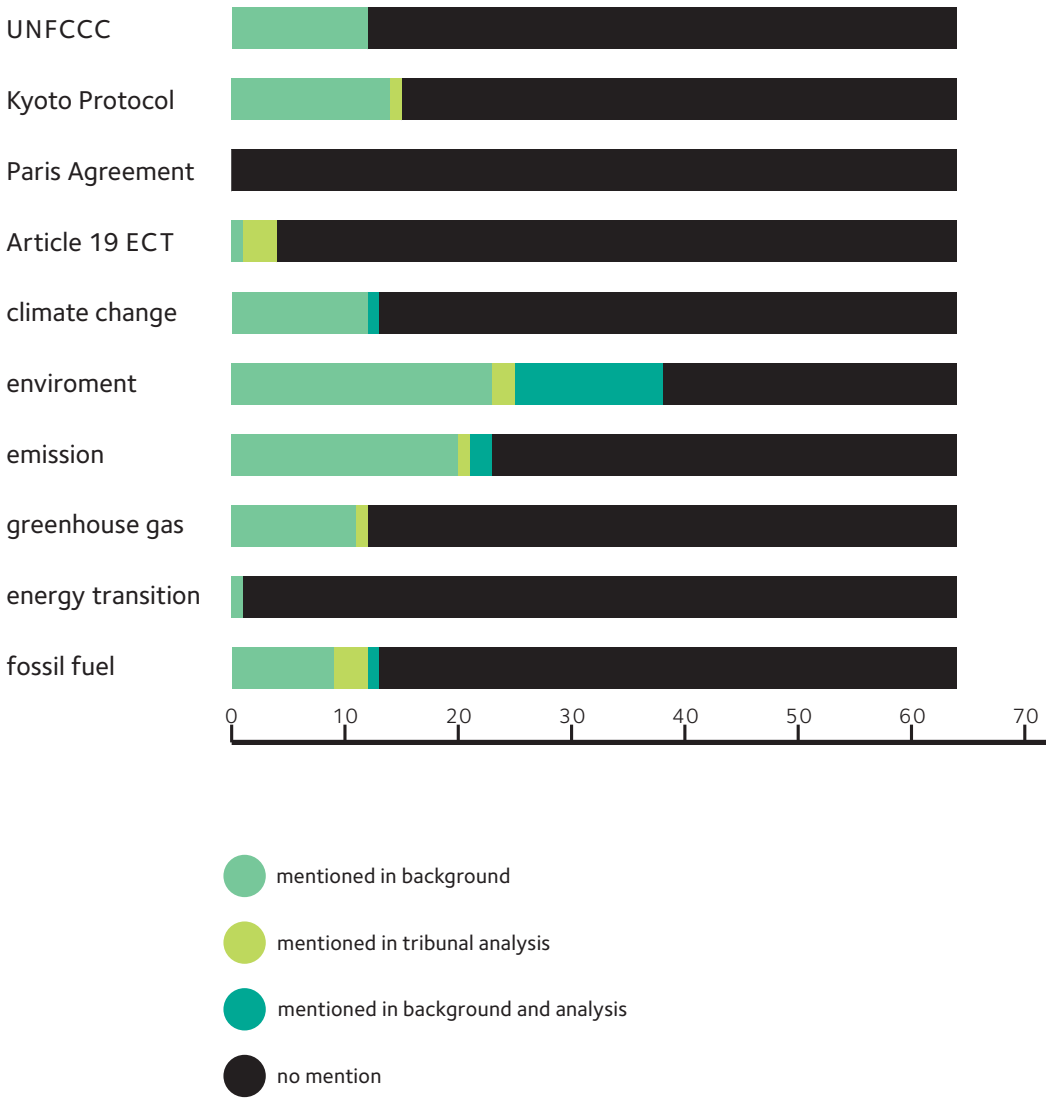
d. Conclusions regarding the ECT's impact on energy transition

The connections between energy investments, climate change and energy transition have so far not been reflected as issues in the ECT jurisprudence. None of the 64 awards rendered to date has weighed the investor protections under the ECT against the energy transition policy of the host state. This means that in future investor claims challenging a state's fossil-fuel phaseout policies, tribunals will have no direct precedent under the ECT.

[26] Other keywords included: energy policy/policies, policy space, right to regulate environmental protection, emissions, greenhouse gases, SDGs, NDC/Nationally Determined Contributions, Effort Sharing Regulation, Green Deal, Emissions Trading System, CCS/carbon capture and storage, carbon trading, carbon dioxide, fossil fuel, human rights, right to a healthy environment, precautionary principle, preventive/prevention principle.

While energy transition has not been an explicit issue in ECT awards, it cannot be concluded that the treaty has had no impact on energy transition to date. The fact that some countries, notably Spain and Italy, have faced so many investor claims as a result of their renewable energy incentive schemes could impact energy transition by (a) creating a disincentive for states to pass bold energy transition policies ("regulatory chill"), (b) create an incentive for more efficient policy making in the future, and (c) making renewable energy investors less likely to rely on similar incentive schemes in the future.

FIGURE 3: CLIMATE CHANGE-RELATED WORDS IN 64 ECT AWARDS



6. INTERACTION BETWEEN THE ECT AND OTHER TREATIES

Have tribunals interpreted the ECT investment protections in the context of international climate law?

To evaluate how the ECT relates to climate change and energy transition, it is necessary to consider how tribunals have weighed – or would weigh – the treaty's investment protections against state obligations under the Paris Agreement and other climate-related treaties. As shown in the previous section, the review of awards revealed that no tribunal has yet had to engage in such analysis.

This is likely to change, however, as countries regulate to phase out fossil fuels and meet their commitments and obligations under international climate law. In investor claims challenging such regulatory measures – such as the two claims filed against The Netherlands in 2021 – the host state may raise defenses based on climate law, including the Paris Agreement, human rights law, or EU climate law. This will require tribunals to weigh the protections that the ECT provides foreign investors against the host state's obligations under climate-related treaties.

While there is no direct precedent for such cases under the ECT, there is legal reasoning in other awards that could apply by analogy – awards in which tribunals have weighed the ECT's investment protections against state obligations under other treaties, notably the Treaty on the Functioning of the European Union (TFEU). The lists of cases in the following sections are not exhaustive; rather, awards have been selected to illustrate the different positions that tribunals have taken on the interplay between the ECT and other areas of international law.

"No tribunal has yet weighed the ECT's investment protections against state obligations under the Paris Agreement and other climate-related treaties."

a. Which laws apply in ECT investor-state disputes?

Investor-state disputes are subject to a set of procedural arbitration rules, each containing a provision on applicable law. Under the ECT, an investor can bring claims under the Rules of the International Centre for Settlement of Investment Disputes (ICSID), the UNCITRAL Arbitration Rules, or the Arbitration Rules of the Stockholm Chamber of Commerce (SCC).

These three sets of arbitration rules contain similar provisions on applicable law – stating that the arbitrators should decide the merits of the dispute on the basis of *the law agreed upon by the parties* and that, in the absence of such agreement, the tribunal "shall apply the law or rules of law that it considers most appropriate."[27] In the context of the ECT, "the parties" making the choice of applicable law are the state parties to the treaty – not the investor initiating the arbitration. The law agreed upon is stated in Article 26(6) of the Treaty, which requires tribunals to decide investor-state disputes "in accordance with this Treaty and applicable rules and principles of international law."

Article 26: Settlement of Disputes between an Investor and a Contracting Party

(6): A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

The first part of Article 26(6) requires tribunals to decide investor-state disputes "in accordance with this Treaty." Doing so often requires tribunals to interpret specific terms and provisions (as shown in sections 7 and 8 below). Treaty interpretation is guided by the 1969 Vienna Convention on the Law of Treaties ("VCLT") – a generally applicable procedural treaty.[28] The VCLT is referenced in most ECT awards. In *Liman Caspian v. Kazakhstan*, for example, the tribunal stated:

[27] See SCC Arbitration Rules Art 27 ("The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law that it considers most appropriate."); UNCITRAL Arbitration Rules Art 35 ("The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate."); ICSID Arbitration Rules Art 42 ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.").

[28] VCLT: Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331. Available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

> *"[T]he Tribunal must, as required by the 'General rule of interpretation' of Article 31 of the VCLT, interpret the ECT's provisions in good faith in accordance with the ordinary meaning to be given to them in their context and in light of the ECT's object and purpose."*[29]

Article 31 of the VCLT explains that the context of a specific treaty term or provision includes the treaty's preamble and annexes. The ECT preamble references the UNFCCC and other international environmental agreements, and expressly recognizes "the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations." As shown in Section 5, however, these provisions have so far not played any significant role as context for the ECT's protections of foreign investments.

The second part of Article 26(6) requires tribunals to decide investor-state disputes *"in accordance with . . . applicable rules and principles of international law."* This requirement mirrors Article 31(3)(c) of the VCLT, which stipulates that tribunals should interpret a treaty taking into account "any relevant rules of international law applicable in the relations between the parties." This includes customary international law as well as include state obligations under international climate, environmental and human rights treaties. For EU member states, EU legislation in those same areas would also be applicable,[30] at least to the extent that tribunals view EU law as international law.[31]

The requirement in Article 26(6) of the ECT and Article 31(3)(c) of the VCLT that tribunals should interpret the provisions of one treaty – such as the ECT – in a way that harmonizes with other treaties – such as the UNFCCC – is sometimes referred to as the principle of systemic integration.[32] The principle embodies a normative preference for a coherent international legal system.

[29] Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Excerpts of the Award (22 June 2010) para. 171.
[30] 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'), passed in July 2021, may also be applicable as a defense in investor claims challenging state actions designed to meet the EU objectives of climate neutrality by 2050 and the intermediate target of reducing net emissions by at least 55% by 2030.
[31] As explained by the tribunal in Electrabel v. Hungary: "EU law has a multiple nature: on the one hand, it is an international legal regime; but on the other hand, once introduced in the national legal orders of EU Member States, it becomes also part of these national legal orders." Many tribunals have tended to regard EU law as international law because it is based on treaties. Electrabel S.A. v. The Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para 4.118.
[32] See, for example, the symposium of articles on Regime Interaction in Investment Arbitration, Kluwer Arbitration Blog, January 10-13, available at http://arbitrationblog.kluwerarbitration.com/category/archives/regime-interaction-in-investment-arbitration.

In the ECT, the principle of systemic integration is limited by Article 16, which under certain circumstances explicitly limits the applicability of other treaties in ECT disputes. Article 16 provides that where there is a conflict between an ECT provision and a provision of another treaty, the treaty provision more favorable to the investor will prevail.

No tribunal has yet considered how Article 16 applies in situations where there is a conflict between ECT investor protections and customary international law.

Article 16 Relation to Other Agreements

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty,

(1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and

(2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment.

b. Other treaties as applicable law in ECT awards

A majority of the 64 awards reviewed in this study mentioned an international agreement other than the ECT – most frequently the VCLT – but it is only with respect to EU law that tribunals have engaged in substantive analysis. Many tribunals have had to consider in depth the relationship between EU law and the ECT investor protections, because all the renewable energy claims brought against Spain, Italy and the Czech Republic are intra-EU disputes. In such cases, the host state typically raises EU law as a jurisdictional defense, arguing that intra-EU arbitration is incompatible with EU law.[33] The EC has also made

third-party interventions in many cases, arguing that the EU has exclusive jurisdiction over disputes between EU members.

The role of treaties other than the ECT in ECT arbitrations was explained by the tribunal in *SolEs Badajoz v. Spain:*

> *"[W]hen the ECT is interpreted and applied pursuant to the VCLT, treaties other than the ECT could also play a role as applicable law in a variety of ways, e.g., as agreements relevant to the interpretation of the ECT (pursuant to Article 31 of the VCLT) or as agreements that modify the ECT (pursuant to VCLT Article 40). Thus, under both the ECT and the law of treaties, there are circumstances in which the provisions of a treaty other than the ECT could have an impact on the substantive law to be applied in a dispute in which a breach of Part III of the ECT is alleged and thus can play a role as applicable law."* [34]

In this context, several tribunals have considered the relationship between the ECT investor protections and EU law. One award found that, in the event of an inconsistency, EU law would prevail over the ECT investor protections.

- In *Electrabel v. Hungary*, the state argued that it had implemented the regulatory measures challenged by the investor as a direct result of an EC decision. The tribunal found that state conduct required by EU law could not be in breach of the ECT investor protections. With regard to Article 16 ECT, according to which the treaty most favorable to the investor prevails, the tribunal found that it applies only when there is a material inconsistency between EU law and the ECT's substantive investor protections – which was not the case here.[35] The tribunal concluded, however, that in case of any material inconsistency, EU law would prevail over the ECT in intra-EU disputes, because EU law has modified ECT obligations between EU member states.[36]

[33] See discussion on the Achmea Judgment, Slovak Republic v. Achmea BV, Case C-2084/16, Judgement of the Court of Justice of the European Union (Grand Chamber) (6 March 2018) in some cases, among others 9REN Holding S.A.R.L v Kingdom of Spain and Foresight Luxembourg v. Kingdom of Spain. See also Republic of Moldova v. Komstroy LLC, Case C-741/19, Judgement of the Court of Justice of the European Union (Grand Chamber) (2 September 2021).
[34] SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award (31 July 2019), para. 162.
[35] Electrabel SA v Republic of Hungary, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 4.175-176.
[36] The tribunal based this conclusion on Article 307 of the EC Treaty (Article 351 TFEU), which as interpreted by the ECJ meant that, "if any inconsistency existed between the ECT and EU law, the ECT would apply in relations between EU Members and Non-EU Members, *but that EU law would prevail over the ECT in relations between EU Members themselves*." Electrabel SA v Republic of Hungary, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para 4.187-4.191.

Several subsequent tribunals have not followed the *Electrabel* tribunal's reasoning. Many have instead found that the ECT investor protections prevail over EU law, even in intra-EU disputes, on the basis of ECT Article 16.

- In *RREEF v Spain,* for example, the tribunal noted in its decision on jurisdiction that Article 16 "expressly stipulates the relationship between the ECT and other agreements." [37] The tribunal reasoned that applicable treaties should to the extent possible be interpreted in such a way as not to contradict each other.[38] Where this is not possible, however, and an inconsistency remains between the ECT and EU law, "the unqualified obligation in public international law of any arbitration tribunal constituted under the ECT would be to apply the former." [39]

- The tribunal in *Vattenfall v. Germany* made a similar interpretation of Article 16. The case settled before a final award was rendered, but in a jurisdictional decision the tribunal found that "Article 16 poses an insurmountable obstacle to Respondent's argument that EU law prevails over the ECT." [40]

- In *FREIF Eurowind v. Spain* the tribunal noted: "Although the Tribunal does not accept that the ECT and EU law relate to the same subject-matter, it is persuaded that [claimant's] reliance on Article 16 is justified and that it has established more favourable provisions under the ECT compared to under EU law in both a procedural and substantive sense." [41]

- In a confidential award reviewed for the study, the tribunal noted: "Article 16 clearly rests on the understanding that the ECT and the EU treaties were intended by ECT Contracting Parties (including EU) to co-exist, with investors entitled to take the benefit of the more favourable treaty provision in any particular case."

[37] RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Kingdom of Spain, ICSID Case No ARB/13/30, Decision on Jurisdiction (6 June 2016), para. 75.
[38] Id. at 76.
[39] Id. at 87.
[40] Vattenfall v. Germany (II) Decision on the Achmea Issue, para 229.
[41] FREIF Eurowind Holdings Ltd v. Kingdom of Spain, SCC Case No. 2017/060, Final Award (8 March 2021), para. 325.

c. International law as a fact in ECT awards

In *AES Summit v. Hungary*, a case factually comparable to *Electrabel*, the tribunal agreed with *Electrabel* that "the application of Article 16 of the ECT only requires to be analyzed in the event the ECT contains a provision that conflicts with EC law."[42] The arbitrators found that the dispute before them was not about a conflict between EU law and the ECT. They noted:

> *Rather, the dispute is about the conformity or non-conformity of Hungary's acts and measures with the ECT. Therefore, it is the behaviour of the state (the introduction by Hungary of the Price Decrees) which must be analyzed in light of the ECT, to determine whether the measures, or the manner in which they were introduced, violated the [Energy Charter] Treaty. The question of whether Hungary was, may have been, or may have felt obliged under [EU] law to act as it did, is only an element to be considered by this Tribunal when determining the "rationality," "reasonableness," "arbitrariness" and "transparency" of the reintroduction of administrative pricing and the Price Decrees.*[43]

In other words, the *AES Summit* tribunal did not make a finding as to the supremacy of EU law over the ECT or vice versa, but rather took EU law into account as a "fact" in its analysis of the alleged breach of the ECT investor protections (discussed in section 7 below).[44]

Similarly, the tribunal in *Watkins Holding v. Spain* considered EU law as a fact in assessing whether the investor was entitled to legitimate expectations that Spain's incentive scheme for renewable energy investments would not be significantly altered. The tribunal explained that the investor's expectations were legitimate and reasonable in part because that scheme "was part of a wider international and domestic policy to develop RE power generation infrastructure and to specifically encourage and attract the necessary investments."[45] In other words, the fact that Spain's incentive scheme was part of an international energy policy entitled the investors to rely on the scheme.

[42] AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II), ICSID Case No. ARB/07/22, para. 7.6.7.
[43] Id. at 7.6.9.
[44] Notably, the tribunal differed from that in Electrabel in its analysis of Article 307 of the EC Treaty. While the Electrabel tribunal had interpreted Article 307 to support the supremacy of EU law in relations among member states, the AES tribunal stated that Article 307 only applies to relations between member states and non-member states, and only to relations between states, not between states and investors. See AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II), ICSID Case No. ARB/07/22, para. 7.6.11.
[45] Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Award (21 January 2020), para. 527.

The tribunal in *Photovoltaik v. Czech Republic* also treated EU law as a fact in its analysis of whether the state's revisions to its incentive scheme for solar energy had breached the FET standard.[46] The tribunal found that because the incentive scheme constituted state aid under EU law, and because it had not been approved by the EC at the time of the investment, the foreign investor could not reasonably expect that the scheme would remain unchanged.

d. Principles of customary international law in ECT awards

Customary principles of international law have not played a central role in ECT awards. However, in one of the first investor-state cases under the ECT, *Plama v. Bulgaria*, the *Plama* tribunal dismissed the investor's claim based on the principle of good faith. The tribunal noted that "the ECT should be interpreted in a manner consistent with the aim of encouraging respect for the rule of law"[47] and that "the substantive protections of the ECT cannot apply to investments that are made contrary to law." The tribunal found that the investor in the case, by intentionally withholding the real identity of the shareholders, acted contrary to the principle of good faith and thereby violated "applicable rules and principles of international law". The investment therefore could not be covered by the ECT investor protections.[48]

e. The role of prior arbitral decisions

Tribunals in ECT investor-state arbitrations support their reasoning and decisions with references to a wide variety of sources of law: the ECT itself, prior arbitral decisions under the ECT, arbitral decisions under other investment agreements, state law, other treaties, and customary international law.

While all awards refer to prior awards, tribunals vary in the amount of weight they give to the reasoning and outcomes of those awards. In principle, precedent has no binding effect in investment arbitration, and many ECT tribunals have emphasized that they are not bound by the decisions of previous tribunals. The tribunal in *Soles Badajoz v. Spain*, for example, declared that:

[46] Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic, PCA Case No. 2014-21, Award (15 May 2019), para. 522.
[47] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (27 August 2008) para. 138-140.
[48] Id.

> *"[T]he Statute of the International Court of Justice expressly mandates the Court to also take into account 'judicial decisions', there is no such express rule either in the ECT, the ICSID Convention or other applicable part of international law as to whether, and if so to what extent, arbitral awards are of relevance to the Tribunal's task. It is in any event clear that the decisions of other tribunals are not binding on this Tribunal. The many references by the Parties to certain arbitral decisions in their pleadings do not contradict this conclusion."*[49]

Similarly, the tribunal in *Eskosol v. Italy* explained:

> *The Parties thus implicitly concur that the Tribunal should take the Blusun award into consideration only to the extent it finds the reasoning of that case to be persuasive, a proposition that is no different than the way in which the Tribunal evaluates any other jurisprudence to which its attention has been drawn. In any event, and for the avoidance of doubt, the Tribunal emphasizes that it resolves the pending issues in this claim based on its own independent analysis, and not on the basis of the decisions of other tribunals.*[50]

Other tribunals have considered themselves more constrained by prior decisions. The tribunal in *PV Investors v. Spain*, for example, noted that "it must pay due consideration to earlier decisions of international tribunals" and that "subject to compelling contrary grounds, it has a duty to adopt principles established in a series of consistent cases."[51]

Based on a general view of the 64 awards reviewed in the course of this study, it appears that most ECT tribunals try to fit their analysis into already established principles and interpretations of the ECT provisions. This does not mean, however, that the outcomes of similar cases are necessarily consistent or predictable.

[49] SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award (31 July 2019), para. 172.
[50] Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award (4 Sept 2020), para 278.
[51] The PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Award (28 February 2020), para. 521.

f. Conclusions relevant for future climate-related claims under the ECT

No ECT tribunal has yet considered the treaty's investment protections in the context of climate change.[52] This is likely to change with the increasing pace and urgency of climate legislation and regulation designed to reduce carbon emissions. In the anticipated wave of fossil-phaseout cases, tribunals will be required to decide how the investor protections apply in disputes where the regulatory measures challenged by the investor were motivated by the host state's obligations and commitments under climate-related and human rights treaties, including the Paris Agreement. Because no direct precedent exists on this issue, parties and tribunals may look to analogous cases in the jurisprudence, including those discussed above.

Only the *Electrabel* tribunal found that EU law would prevail over the ECT in the event of a material inconsistency between the two.[53] This finding may be of significance in intra-EU disputes challenging fossil-phaseout policies, where host states may raise as a defense the inconsistencies between ECT's protection of fossil-fuel investments and EU climate legislation requiring immediate decarbonization. Under the *Electrabel* tribunal's reasoning, in intra-EU disputes, EU climate law would prevail over the ECT. However, there are several awards indicating that the opposite outcome is more likely. Many tribunals have found that under Article 16 ECT, in case of any material inconsistency between EU law and the ECT investor protections, the latter prevails. It remains to be seen which approach will have traction in the context of states adopting measures in compliance with their obligations under the Paris Agreement.[54]

International law could also be considered as facts in future climate-related cases. In the *AES Summit, Watkins Holding,* and

[52] Whether the absence of such analysis is due to the nature of the disputes or to the parties' failure to invoke climate law is beyond the scope of this study, which was limited to arbitral awards rendered (and some related decisions). A commonly held position in investor-state arbitration is that the tribunal is limited in its decision-making to the arguments and law submitted by the parties. Some tribunals have disagreed, e.g. PV Investors v Spain, para 519 ("When applying the law governing the substance of the dispute, the Tribunal is not bound by the arguments and sources invoked by the Parties. Under the maxim jura novit curia – or, better, jura novit arbiter – the Tribunal is required to apply the law of its own motion, provided it seeks the Parties' views if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate.")

[53] The tribunal based this conclusion on Article 307 of the EC Treaty (Article 351 TFEU), which as interpreted by the ECJ meant that, "if any inconsistency existed between the ECT and EU law, the ECT would apply in relations between EU Members and Non-EU Members, but that EU law would prevail over the ECT in relations between EU Members themselves." Electrabel SA v Republic of Hungary, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) para. 4.187-4.191.

[54] Investor-state arbitration and climate change: a plate-spinning act? Clyde & Co, August 2021, available at https://www.clydeco.com/en/insights/2021/08/investor-state-arbitration-and-climate-change-a-pl (Accessed 26 November 2021).

Photovoltaik awards, tribunals took EU law into account as a fact in the tribunal's determination of whether the investor was entitled to legitimate expectations of regulatory stability. Similarly, in a fossil-phaseout dispute, the host state's commitments and obligations under international or EU climate law may be relevant facts in the tribunal's analysis. For instance, an investor in a coal-fired power plant may not be entitled to legitimate expectations of regulatory stability, if at the time when the investment was made, the host state had signed the Paris Agreement – arguably making it foreseeable that the host state would regulate to phase out coal.

Beyond the applicability of other treaties, it is also possible that principles of customary international law will play a role in fossil-phaseout cases. In *Plama v. Bulgaria*, the tribunal dismissed the investor's claim based on the principle of good faith. As the climate crisis gains universal recognition, principles of international environmental law – such as the precautionary principle, the prevention principle, the polluter pays principle, or the no-harm principle – may eventually gain status similar to that of the principle of good faith. The no-harm principle originated in the 1941 Trail Smelter case, where the tribunal declared that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein."[55] The no-harm principle could be found to apply also in investor-state cases, where the host state has implemented regulations to phase out fossil fuels as a way to mitigate cross-border harm.

The ECT jurisprudence confirms that precedent has no binding effect in investment arbitration, but also that most tribunals try to follow established treaty interpretations. The varying degree to which tribunals find themselves bound by prior decisions may be a source of unpredictability and legal uncertainty. It can also mean, however, that tribunals in future climate-related cases will *not* consider themselves constrained by the jurisprudence and thus see themselves as free to reinterpret ECT investor protections in light of state obligations under climate-related treaties and EU climate law.

[55] Trail Smelter Case (United States v. Canada), Award (11 March 1941), 3 R.I.A.A. 1905 at 1965.

7. INVESTOR PROTECTION VS. THE RIGHT TO REGULATE

Have tribunals considered the host state's right to regulate for climate action and energy transition?

None of the 64 available awards reviewed in this study involved an investor claim challenging state action motivated by climate action, decarbonization or energy transition. This means that no ECT tribunal, so far, has weighed the ECT investor protections against the host state's right to regulate for these purposes. This is likely to change as foreign investors in the fossil sector are increasingly affected by new laws and regulations passed to meet emission-reduction obligations.

While there is no direct precedent in ECT jurisprudence for such fossil-phaseout cases, there are analogous cases – cases in which tribunals have weighed the protection of foreign investments against the host state's right to regulate. This section reviews tribunal analysis in such cases, with a view to understanding how tribunals might view state's right to regulate for climate and energy transition in future cases.

"None of the 64 awards involved an investor claim challenging state action motivated by climate action, decarbonization or energy transition. This means that no ECT tribunal, so far, has weighed the ECT investor protections against the host state's right to regulate for these purposes."

a. Types of state conduct challenged by investors under the ECT

The disputes that arise under the ECT can be categorized by the state conduct or action alleged by the foreign investor to breach one or more of the protections in Article 10 or 13 (see Section 4 above).[56] Challenged state conduct generally fall into the following broad categories: (1) adverse regulatory measures, including indirect expropriation (also known as "regulatory taking"); (2) direct expropriation of an investment; (3) discriminatory conduct, including the denial of licenses or permits; (4) breach of contractual obligations; and (5) denial of justice by the respondent state's courts or administrative bodies.

The awards rendered in the first category – "regulatory disputes" – are most relevant to future climate-related cases. These are disputes in which the foreign investor's primary claim relates to the host state's introduction, amendment, or abolition of a regulatory measure that had an alleged negative impact on the value of the investment or the investor's profits. In these disputes, the investors claim that the regulatory measure breached one of the standards in Article 10(1) of the ECT – the assurance of fair and equitable treatment (FET), the protection against unreasonable or discriminatory measures, and the provision of constant protection and security – or that it amounted to an indirect expropriation of the investment, in breach of Article 13(1) of the ECT.[57]

The following sections summarize and discuss awards in regulatory disputes under the ECT, with a focus on the standards applied by tribunals evaluating whether the state's regulatory action constituted a breach of the ECT. Identifying these standards and their applications may serve to anticipate the outcome of future disputes in which investors challenge regulations related to climate action or energy transition.

b. Regulatory disputes not related to renewable energy incentive schemes

Prior to the wave of renewable energy awards that began in 2016, there had been eight awards under the ECT related to a

[56] Stephen Jagusch, Anthony Sinclair, and Philip Devenish, "The Energy Charter Treaty: The Range of Disputes and Decisions", in J.W. Rowley ed. The Guide to Energy Arbitrations, Law Business Research 2015, 30-45.
[57] Section 3 above provides an introduction to these investor protections.

host state's regulatory conduct. Of these, one had been decided in favor of the investor and damages were awarded *(EDF v. Hungary)*, six had been decided in favor of the state, and in one case *(AES Corp. v. Kazakhstan)* the tribunal had found a breach but awarded no damages.

AES Summit v. Hungary (2010)

In the 1990s, Hungary privatized its energy sector and entered into long term power-purchase agreements (PPAs) with foreign investors. The PPAs contained pricing formulas and market privileges. After Hungary joined the EU in 2007, the PPAs were determined by the EC to constitute illegal state aid, which led Hungary to terminate them. Around the same time, following public outrage over the perceived excessive profits of power generators, Hungary also introduced administrative pricing that capped the profits of energy generators.

The tribunal found that Hungary's regulatory conduct constituted a valid and proportionate exercise of regulatory power.[58] The tribunal explained that the standard applicable under the FET provision was a high one:

> *It is only when a State's acts or procedural omissions are, on the facts and in the context before the adjudicator, manifestly unfair or unreasonable (such as would shock, or at least surprise a sense of juridical propriety) – to use the words of the Tecmed Tribunal – that the standard can be said to have been infringed.*[59]

The tribunal found that Hungary's regulatory conduct had not infringed upon this high standard, and thus had not breached the FET standard under Article 10(1) ECT.

The investors also claimed that the state conduct had amounted to an unreasonable or discriminatory measure, with is a separate protection under Article 10(1) ECT. The tribunal recognized that the state's new pricing scheme had a detrimental impact on the investment. The tribunal's test to determine whether this impact amounted to an unreasonable or discriminatory measure had two elements:

[58] AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II), ICSID Case No. ARB/07/22, Award (23 September 2010), para. 10.3.34.
[59] Id. at 9.3.40.

> **1.** *the existence of a rational policy,* meaning a policy "taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter"; and
>
> **2.** *the correlation between that policy and the challenged state act*, which has to do with "the state's public policy objective and the measure adopted to achieve it."[60]

Applying this test, the tribunal found that Hungary's regulatory conduct had been reasonable, proportionate, and motivated by a rational public policy.[61] It thus did not amount to an unreasonable or discriminatory measure against which investors are protected under Article 10(1) ECT.

The *AES Summit* tribunal also explained that the state's duty under Art 10(1) to provide stable conditions for foreign investors is not a stability clause, and that "[a] legal framework is by definition subject to change as it adapts to new circumstances day by day and a state has the sovereign right to exercise its powers which include legislative acts."[62] The tribunal observed that Hungary had not made any specific commitments that could limit its right to change its law or that could legitimately have made the investor believe that no change in the law would occur, and concluded that "any reasonable informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the time."[63]

Finally, on the investor's claim of indirect expropriation, the tribunal explained:

> *[A] state's act that has a negative effect on an investment cannot automatically be considered an expropriation. For an expropriation to occur, it is necessary for the investor to be deprived, in whole or significant part, of the property in or effective control of its investment; or for its investment to be deprived, in whole or significant part, of its value.*[64]

[60] Id. at 10.3.7-10.3.9.
[61] Id. at 10.3.7-10.3.9.
[62] Id. at 9.3.29.
[63] Id. at 9.3.34.
[64] Id. at 14.3.1.

Applying this test, the tribunal found that the investor at all times had remained in control of the investment, which had in fact continued to generate substantial revenues.[65] In sum, the *AES Summit* tribunal rejected all the investor's claims.

Electrabel v. Hungary (2012)

The factual background in *Electrabel* is similar to that in *AES Summit*. With respect to the termination of the claimant's PPA, the tribunal found that the EC had required Hungary to terminate the PPA, and "that act by the Commission cannot give rise to liability for Hungary under the ECT's FET standard."[66]

On the issue of whether the introduction of administrative pricing had breached the FET standard, the tribunal noted that it had to determine whether Hungary had "acted reasonably, in good faith, and without improper motives toward [the investor]."[67] Applying this test, which is similar to that applied in *AES Summit* with respect to unreasonable or discriminatory measures, the tribunal found that introducing administrative pricing was "a rational and reasonably appropriate measure in the prevailing circumstances," and therefore did not constitute a breach of the FET standard.[68] Addressing the investors' argument that the new pricing regulations were politically motivated, the tribunal held:

> *"politics is what democratic governments necessarily address; and it is not, ipso facto, evidence of irrational or arbitrary conduct for a government to take into account political or even populist controversies in a democracy subject to the rule of law."*[69]

Finally, with respect to the investor's claim of indirect expropriation, the *Electrabel* tribunal found that the negative impact of the regulatory measure in this case did not meet the definition of indirect expropriation, which it stated as follows:

[65] Id. at 14.3.3.
[66] Electrabel S.A. v. The Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012), para. 10.3.36.
[67] Id. at 8.22.
[68] Id. at 8.34.
[69] Id. at 8.23.

> *[T]he accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for both direct and indirect expropriation, consistently albeit in different terms, the requirement under international law for the investor to establish the substantial, radical, severe, devastating or fundamental deprivation of its rights or the virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment.*[70]

EDF v. Hungary (2014)

The factual background in *EDF v. Hungary* is similar to that in *AES Summit* and *Electrabel*. Unlike the tribunals in those cases, however, the *EDF* tribunal found in favor of the investor. It is the only award not related to renewable incentive schemes that has found state regulatory conduct to have breached ECT investor protections. The award in *EDF* is not publicly available, so it cannot be determined how the tribunal's analysis differed from, and led to an outcome opposite to that of, the tribunals in *AES Summit* and *Electrabel*. From secondary sources it appears that the tribunal found a breach of the FET standard because, regardless of the termination of the PPAs, Hungary had the possibility under EU law to compensate the investor's stranded costs but failed to do so in a fair and equitable manner.[71] The tribunal ordered Hungary to pay damages to the investor amounting to EUR 107 million.[72]

Plama v. Bulgaria (2008)

Bulgaria enacted an environmental regulation absolving the state from responsibility for environmental damage and pollution caused by state-owned companies before their privatization. The regulation applied retroactively. Claimant was a Cyprus-incorporated investor that had purchased a previously state-owned oil refinery. Claimant argued that the new environmental regulation placed an undue burden for past environmental damage on the investor, and alleged that Bulgaria had breached its obligation under the ECT to provide a stable regulatory framework.

[70] Id. at 6.62.
[71] P. Paschalidis, "The Impact of EU State Aid Law on International Investment Law and Arbitration" in K. Fach Gómez et al, eds., European
[72] Yearbook of International Economic Law: International Investment Law and Competition Law, Springer 2020, p 188.
See https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/364/edf-v-hungary (accessed 1 December 2021).

The tribunal dismissed the investor's claim on jurisdiction, finding that the investor's fraudulent misrepresentations in acquiring the investment had been contrary to Bulgarian and international law, which precluded the application of the ECT investor protections.[73] Although the case was dismissed on jurisdiction, the tribunal also concluded that the claims would have failed on the merits, because the investment had been a high-risk project that failed "for reasons . . . not attributable to any unlawful actions of Bulgaria".[74]

Notably, on the issue of indirect expropriation, the tribunal noted that such a claim cannot be based on an anticipated loss of value. The fact that the investor had not yet suffered any losses as a result of Bulgaria's new environmental law would have been detrimental to its claim of indirect expropriation if it had been considered on the merits.[75]

Mercuria v. Poland (2011)

A Cyprus-registered investor had incurred a EUR 200 million fine for failing to comply with Poland's implementation of an EU directive requiring an increase in mandatory fuel reserves.[76] The award is not public, but public sources reveal that both a decision on jurisdiction and a final award were rendered in the case, meaning that the case was decided on the merits.[77] It is also publicly known that the tribunal found in favor of the state.[78]

Alapli v. Turkey (2012)

A Dutch investor's claim alleged that a number of legislative changes concerning infrastructure projects had an adverse impact on its investment in the development of a combined-cycle power plant in Turkey. The case was dismissed on jurisdiction, and the tribunal did not consider the merits of the investor's claims relating to the alleged adverse regulatory conduct.[79]

[73] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 135.
[74] Id. at 305.
[75] Id. at 225-227.
[76] See https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/322/mercuria-energy-v-poland (accessed 30 November 2021).
[77] Id.
[78] Id. ("decided in favor of state").
[79] Alapli Elektrik B.V. v. Republic of Turkey, ICSID Case No. ARB/08/13, Award (Excerpts) (16 July 2012), para. 424.

AES Corp v. Kazakhstan (2013)

Claimants, a U.S. energy company and its Dutch subsidiary, were owners of a number of power facilities and trading companies that held rights under long-term concessions concluded with the Kazakh government. The claims arose out of a series of fines and tariff restrictions imposed on claimants under amendments to the host state's competition law.[80]

The tribunal rejected the majority of the investors' claims. With reference to the high threshold set in *AES Summit v. Hungary* for a regulatory measure to constitute a breach of the FET standard, the *AES Corp* tribunal found that the changes in Kazakhstan's competition laws did not pass that threshold – even if they had resulted in disadvantages for claimants.[81] Moreover, the tribunal found, it was "clear from the very beginning of the investment that Kazakhstan would be reforming its competition law."[82]

The tribunal also found, however, that the FET standard had been breached by another state policy – one that required the claimants to reinvest all profits. The tribunal explained that "in order to determine the proportionality or reasonableness of certain restrictions, the duration of the restriction and its necessity to achieve the pursued goal are important criteria."[83] Applying those criteria to the circumstances of the case, the tribunal found:

> *While the Arbitral Tribunal accepts that certain restrictions concerning the level of returns to be earned or to be repatriated may be justified in circumstances where investment in electricity generating infrastructure appears indispensable to prevent a collapse of the electricity distribution system, the restrictions imposed by Respondent would only be justified if the threat of collapse was real and imminent and the measures necessary to prevent the collapse could not be implemented by means that involved a lesser intrusion upon the Claimants' rights.*[84]

[80] AES Corporation and Tau Power B.V. v. Republic of Kazakhstan, ICSID Case No. ARB/10/16, Award (1 November 2013), para. 47.
[81] Id. at 314.
[82] Id. at 279.
[83] Id. at 403.
[84] Id. at 406..

The tribunal found that the restrictions imposed by the host state in this case were not proportional and reasonable, but rather that their drastic character and extended duration was disproportionate to the perceived threat of collapse. The tribunal also found that the state had not explored other policy options that would have a lesser impact on the investors' rights.

Despite having found a breach of the FET standard, the tribunal did not award the investors any compensation – because they had failed to establish their damages.[85]

Mamidoil v. Albania (2015)

The investor in *Mamidoil* was a Greek investor selling oil products in Albania and operating primarily by shipping such products to the port of Durres on the Albanian coast and storing them in a nearby tank farm. The state implemented a series of regulatory measures in the maritime transport sector, including the re-zoning of the port of Durres, eventually closing it to shipping and storing of oil products. The investor claimed that the regulatory measures had constituted a breach of several ECT investor protections.

With respect to the investor's claim of breach of the FET standard, the tribunal noted first that the host state had made no specific assurances on which the investor could have based legitimate expectations that the applicable regulatory framework would remain unchanged.[86] Considering whether the investor could have formed legitimate expectations based on the host state's conduct and other circumstances, the tribunal took into account a wide variety of factors, including the country's political and economic situation. The tribunal noted:

> *Even if Claimant did not expect this development to happen, it is not legitimate to insist that the old structures be perpetuated. When balancing both Parties' interests, Respondent's right to conduct a public policy of consistent modernization prevails. In any event, as explained above, Claimant was given repeated warnings about the change in Albania's policy.*[87]

[85] Id. at 468-469.
[86] Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award (30 March 2015), para. 691-92.
[87] Id. at 734..

Consequently, Albania's regulatory measures were not found to violate any legitimate expectations on the part of the investor, and thus did not amount to a breach of the FET standard.

With respect to the investor's claim that the regulatory measures had amounted to an indirect expropriation, the *Mamidoil* tribunal applied a test similar to the *AES Summit* and *Electrabel* tribunals. Citing non-ECT caselaw, the tribunal explained:

> *Regulations that reduce the profitability of an investment but do not shut it down completely and leave the investor in control will generally not qualify as indirect expropriations . . . [F]or an expropriation to exist, the investor should be substantially deprived not only of the benefits, but also of the use of its investment. A mere loss of value, which is not the result of an interference with the control or use of the investment, is not an indirect expropriation.*[88]

Applying this test, the tribunal rejected the investor's indirect expropriation claim.

In its assessment of the investor's claims, the *Mamidoil* tribunal emphasized that the state's regulatory conduct was part of an overall transport sector policy, which had been carefully prepared, with international professional and financial assistance, to modernize the country's infrastructure and to enforce environmental, social and economic policy goals.[89] Importantly, the tribunal noted that "Claimant was aware of this when it started to construct the tank farm."[90]

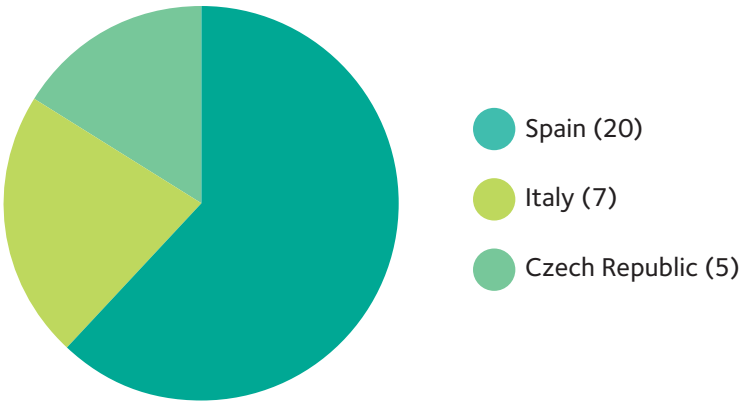
[88] Id. at 572.
[89] Id. at 574.
[90] Id. at 574.

c. Regulatory disputes related to renewable energy incentive schemes

As the previous section shows, in the first decade or so of ECT jurisprudence, tribunals generally were protective of the state's right to regulate – even where regulatory measures negatively impacted foreign investments. The available awards set a consistently high bar against which to assess allegedly adverse regulatory conduct. Regulatory measures that were reasonably and proportionally related to a rational public policy objective did not breach the FET standard or the protection against unreasonable and discriminatory measures. And unless such measures deprived the claimant of the use and control of its investment, they did not amount to an indirect expropriation ("regulatory taking"). Since 2015, these tests and standards for assessing the state's right to regulate have been frequently interpreted and applied in disputes related to renewable energy incentive schemes.

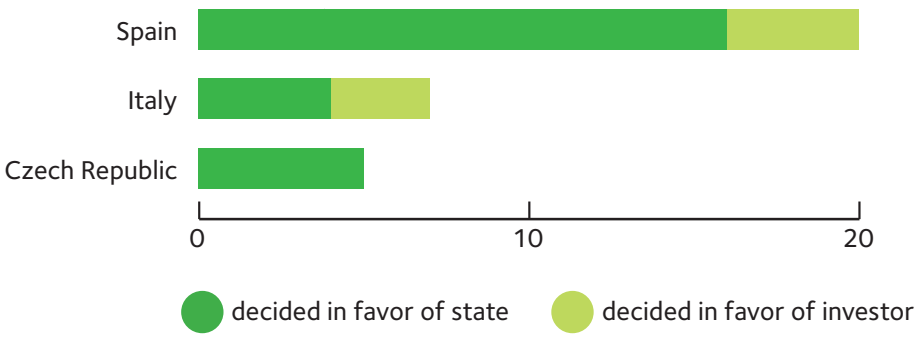
Of the 64 awards reviewed in this study, 32 related to amendments that states made to previously enacted incentive schemes for renewable energy. Twenty of these awards involved Spain, seven involved Italy, and five involved the Czech Republic. The three countries had all created incentive schemes in the 2000s to stimulate investments in the renewable energy sector. In part because the incentive schemes resulted in an unexpected investment boom, the countries amended the schemes, reducing the incentives. Investors experienced a drop in expected profits, and many filed claims under the ECT's investor protections.

FIGURE 4: RESPONDENT STATES IN CASES RELATING TO RENEWABLE ENERGY INCENTIVE SCHEMES



The awards in these disputes have interpreted and developed the standards established in the earlier awards in regulatory disputes – from *AES Summit* to *Mamidoil* – discussed above. Unlike the earlier cases, many of the renewable energy cases have been decided in favor of the investor. Specifically, 16 of 20 awards have found Spain liable for breach of the ECT investor protection, and 3 of 7 awards have found Italy liable. By contrast, liability was not found in any of the 5 awards rendered in disputes against the Czech Republic.

FIGURE 5: OUTCOMES OF CASES RELATING TO RENEWABLE ENERGY INCENTIVE SCHEMES



While some investors in the solar cases have made claims of indirect expropriation under Article 13(1) ECT, none of these claims have been successful.[91] The tribunals have upheld the high bar for a finding of indirect expropriation developed in the early regulatory disputes, discussed in the previous section of this report. For this reason, indirect expropriation will not be further discussed here. This section focuses instead on the developments of the standards under Art 10(1) ECT, primarily the FET standard. The main thrust of the FET analysis in these cases has been the issue of whether the investor was entitled to legitimate expectations that the regulatory framework would remain unchanged.

Whether investors are entitled to legitimate expectations of regulatory stability will likely be a central issue in future climate-related cases. For this reason, the discussion of awards in this section focuses on three particularly relevant themes: (1) the requirement of a "specific commitment" for a foreign investor to form legitimate expectations of regulatory stability; (2)

[91] Claimants have made indirect expropriation claims in the following cases: Charanne v. Spain, Isolux Infrastructure v. Spain, Eiser Infrastructure v. Spain, Blusun v. Italy, InfraRed Environmental Infrastructure v. Spain, Cube Energy v. Spain, SolEs Badajoz GmbH v. Spain, Hydro Energy 1 v. Spain, Eskosol v. Italy, Novenergia II v. Spain, Foresight Luxembourg v. Spain.

the extent to which an investor is entitled to expectations of "general stability" of the host state's legal regime; and (3) the investor's duty of due diligence before forming such expectations.

d. "Legitimate expectations" based on a specific commitment

Many tribunals centered their analysis of the FET standard on whether the host state had made a "specific commitment" of regulatory stability. Put simply, these tribunals agreed that investors could expect state regulation to remain unchanged only where the state had made a specific commitment or promise to that effect. They have not agreed, however, what constitutes such a promise. In some cases, the tribunals found that an incentive scheme did not constitute a specific commitment of regulatory stability.[92] For example:

- The *Charanne v. Spain* tribunal noted that "[specific] commitments could have been made on the basis of a stabilization clause, or with any kind of statement that the State had directed to the investors, according to which the existing regulatory framework will not change. Such declarations have not been addressed to the Claimants."[93] The tribunal found that legitimate expectations could not arise from an incentive scheme directed at a group of investors, because "[t]o convert a regulatory standard into a specific commitment of the state, by the limited character of the persons who may be affected, would constitute an excessive limitation on power of states to regulate the economy in accordance with the public interest."[94]

- Similarly in *Stadtwerke Munchen v. Spain*, the tribunal found that "it would have been unreasonable for the Claimants to have interpreted [the incentive scheme] as constituting a stabilized regime for the calculation of the premium that would be impervious to any future modification regardless of a change in the market conditions."[95]

[92] Isolux Infrastructure Netherlands B.V v. Kingdom of Spain, SCC Case V2013/53, Unofficial Translation of Award (17 July 2016), para. 775; InfraRed Environmental Infrastructure v Kingdom of Spain, ICSID Case No. ARB/14/12, Award (2 August 2019), para. 366.
[93] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain, SCC Case No. 062/2012, Award (21 January 2016), para. 490.
[94] Id. at 493.
[95] Stadtwerke München GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award (2 December 2019), para. 282.

- In *Blusun v. Italy*, the tribunal explained that "a reasonable market expectation as to some state of affairs, justified or not, is not a basis for shifting risks to the public sector, i.e. the state budget. Circumstances change and in the absence of specific commitments, the risk of change is for entrepreneurs to assess and assume."[96] Applying this standard, the tribunal found that Italy had made no such special commitment to the investors with respect to the incentive scheme. [97]

- In *Photovoltaik v. Czech Republic*, the tribunal explained that "[t]he state has a right to regulate, and investors must expect that the legislation will change, absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability."[98] The tribunal found that, even though the incentive regime was intended to attract foreign investment, it did not offer such a specific assurance of stability and predictability to foreign investors.[99]

- In *Isolux v. Spain*, the tribunal also found no breach of the FET standard, albeit on the basis that by the time the claimants made their investment, the regulatory regime had already been modified. Because it had been changed once, the tribunal held, no reasonable investor could have had the expectation that the framework would not be modified again in the future.[100]

Other tribunals found that the state had, in fact, made a specific commitment of stability to the foreign investors. For example:

- The tribunal in *Novenergia v. Spain* found that the incentive scheme constituted a specific commitment towards a defined group of investors. The tribunal explained: "The commitment from the Kingdom of Spain could not have been clearer. A considerable number of RE companies also invested in reliance on these statements and assurances."[101]

[96] Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award (27 December 2016), para. 373.
[97] Id. at 374.
[98] Photovoltaik Knopf Betriebs-GmbH v Czech Republic, PCA Case Np. 2014-21, Award (15 May 2019) para. 493.
[99] Id. at 486.
[100] Isolux Infrastructure Netherlands B.V. v. Kingdom of Spain, SCC Case No. V2013/153, Award (12 July 2016), para. 787.
[101] Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain, SCC Case No. 2015/063, Award (15 February 2018), para. 667.

- Similarly, in *Masdar v. Spain,* the tribunal considered that Spain, through its incentive scheme, had "guaranteed the stability of the benefits, if the investors fulfilled a certain number of conditions, both procedural and substantial, during a certain window of time."[102] Indeed, the tribunal found that "[i]t would be difficult to conceive of a more specific commitment than a Resolution issued by Spain addressed specifically to each of the Operating Companies, confirming that each of the Plants qualified under the [incentive scheme] for their 'operational lifetime'."[103]

- The tribunal in *OperaFund v. Spain* reached the same conclusion, noting that "it is hard to imagine a more explicit stabilization assurance than the one mentioned in Article 44(3) [of the original incentive scheme]: 'revisions [...] shall not affect facilities for which the functioning certificate had been granted.'"[104]

- The tribunal in *InfraRed v. Spain* found that "a legitimate expectation of stability . . . can only arise in the presence of a specific commitment tendered directly to the investor or industry sector at issue."[105] The Tribunal found that Spain's representations toward the renewable energy investors amounted to such a commitment, albeit of a limited scope.[106]

e. "Legitimate expectations" based on other circumstances

Many tribunals in renewable energy disputes have also considered whether a foreign investor is entitled to expect a certain level of stability of the host state's legal regime, regardless of whether the state has made a commitment to that effect. Some tribunals have found that such expectations are legitimate under certain circumstances. For example:

- In *Eiser v Spain*, the tribunal noted that "Article 10(1)'s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by

[102] Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award (16 May 2018), para. 513.[103] Id. at 520.
[104] OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36, Award (6 September 2019), para. 485.
[105] InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain, ICSID Case No. ARB/14/12, Award (2 August 2019), para. 366.
[106] Id. at 449-450.

investors in making long-term investments."[107] The tribunal held that although the investors "could not reasonably expect that there would be no change whatsoever in the [incentive scheme] over three or four decades . . . Article 10(1) of the ECT entitled them to expect that Spain would not drastically and abruptly revise the regime, on which their investment depended, in a way that destroyed its value."[108] The tribunal found that Spain's amendments to the regime "deprived Claimants of essentially all of the value of their investment" and that "[d]oing so violated Respondent's obligation to accord fair and equitable treatment."[109]

- The tribunal in *RWE Innogy v. Spain* also found that "even absent a showing of specific commitments that the regulatory regime would not change, a breach of Article 10(1) may be established if there has been some form of total and unreasonable change to, or subversion of, the legal regime."[110] The tribunal explained that its task was to assess whether the change to the tariff regime had been disproportionate, and whether Spain had taken into account the impacts on investors in its decision-making process.[111] Applying this test, the tribunal found that certain of the measures adopted by Spain were disproportionate and that it was "unfair and inequitable for the adverse impacts to these specific plants to be borne by the Claimants."[112]

- In *Foresight v. Spain*, the tribunal explained that "sophisticated investors like the Claimants should have reasonably expected that [the incentive scheme] could be modified, 'but within foreseeable limits'."[113] The tribunal found that Spain's regulatory amendments went beyond the foreseeable limits and constituted a "wholly different regulatory approach, based on wholly different premises". In the tribunal's view, such a "fundamental change to the legal and regulatory framework . . .

[107] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award (4 May 2017), para. 382 (emphasis added).
[108] Id. at 387.
[109] Id. at 418.
[110] RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum (30 December 2019), para. 451 (emphasis added).
[111] Id. at 462.
[112] Id. at 600.
[113] (1) Foresight Luxembourg Solar 1 S.À.R.L., (2) Foresight Luxembourg Solar 2 S.À.R.L., (3) Greentech Energy Systems A/S, (4) GWM Renewable Energy I S.P.A., (5) GWM Renewable Energy II S.P.A. v. Kingdom of Spain, SCC Case No. 2015/150, Final Award (14 November 2018), para. 397.

crossed the line from a non-compensable regulatory measure to a compensable breach of the FET standard in the ECT."[114]

- Similarly in *Antin v. Spain*, the tribunal held that Article 10(1) ECT includes an obligation to afford "fundamental stability in the essential characteristics of the legal regime relied upon by the investors in making long-term investments."[115] The state can adapt the legal regime to the changing circumstances in the public interest, but "a regulatory regime specifically created to induce investments in the energy sector cannot be radically altered —i.e., stripped of its key features— as applied to existing investments[.]"[116] Here, as in the awards requiring a specific commitment of stability, the tribunal focused on the fact that Spain had actively sought to attract the investments.

- In *Cube Infrastructure v. Spain*, the tribunal "[did] not consider it necessary that a specific commitment be made to each individual claimant in order for a legitimate expectation to arise." The tribunal explained that in highly regulated industries, incentive schemes established with the overt aim of attracting investments "are plainly intended to create expectations upon which investors will rely; and to the extent that those expectations are objectively reasonable, they give rise to legitimate expectations when investments are in fact made in reliance upon them."[117]

- The *RREEF v. Spain* tribunal "ruled that the Claimants had no legitimate expectation that the regime provided for in [the incentive scheme] would remain unchanged throughout the term of the investment."[118] But the tribunal found that the investors were nonetheless entitled to "a legitimate expectation to get a reasonable return on their investments."[119] This included an expectation that any modifications to the applicable legal regime would be reasonable and equitable, which in consideration of all the circumstances, the tribunal

[114] Id. at 397-98.
[115] Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain, ICSID Case No. ARB/13/31, Award (5 June 2018), para. 532.
[116] Id.
[117] Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and a Partial Decision on Quantum (19 February 2019), para. 388.
[118] RREEF Infrastructure v Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum (30 November 2018), para. 379.
[119] Id. at 399.

found that they were not.[120] In making that determination, the tribunal emphasized that the modified regulatory framework did not allow the investors a "reasonable rate of return" on their investment.

- In *Hydro Energy v Spain*, the tribunal explained that "changes to general legislation (at least in the absence of a stabilization clause) are not prevented by the FET standard if they do not exceed the acceptable margin of change in the exercise of the host State's normal regulatory power in pursuance of a public interest."[121] In determining whether the regulatory amendments had exceeded the acceptable margin of change, the tribunal in *Hydro Energy* conducted a balancing exercise similar to the *RREEF* tribunal, eventually concluding that the modifications went beyond the margin of change if they did not afford the investor a reasonable rate of return.[122]

f. The requirement of due diligence before making an investment

Many tribunals have considered whether the foreign investor conducted due diligence prior to making the investment and before forming any expectations of regulatory stability.[123] Some tribunals have held that due diligence constitutes a prerequisite for protection under Article 10(1) ECT. For example:

- The *Charanne v. Spain* tribunal held that legitimate expectations can only be formed after a due diligence analysis of the relevant regulatory framework. To be in violation of the legitimate expectations of the investor, "regulatory measures must not have been reasonably foreseeable at the time of the investment."[124] Applying this test, the tribunal found that the investor should have foreseen that the regulatory framework might change, on the basis of indications to that effect given in decisions by the Spanish Supreme Court.[125]

[120] Id. at 399.
[121] Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March 2020), para. 676.
[122] Id. at 770.
[123] For a general discussion of due diligence in investment arbitration, see Yulia Levashova, *Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law*, 67 Netherlands International Law Review 233 (2020). *See also* N. Braoudakis et al, *Protecting Renewables with the Energy Charter Treaty: A False Good Idea*, Veblen Institute for Economic Reforms, July 2021, at 15.
[124] Charanne B.V. and Construction Investments S.A.R.L. v. Kingdom of Spain, SCC Case No. 062/2012, Award (21 January 2016), para. 505
[125] Id. at 506.

- In *Stadtwerke München v. Spain*, the tribunal stated that to be legitimate, justifiable and reasonable, the investors' expectations must arise from a "rigorous due diligence process carried out by the investor."[126] In this case, the tribunal found that "a prudent investor, having conducted an appropriate due diligence, would not have reasonably formed an expectation of a legally stable income stream for the life of the [investment]."[127]

- In *Antaris v. Czech Republic*, the tribunal stated the due diligence principle as follows: "given the State's regulatory powers, in order to rely on legitimate expectations the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State."[128]

- In *Masdar v. Spain*, the tribunal stated that, "[i]f the general legislation is to be regarded as a source of an investor's legitimate expectations, the investor must demonstrate that it has exercised appropriate due diligence and that it has familiarised itself with the existing laws."[129] The tribunal found that the investors in the case had undertaken sufficient due diligence, including by commissioning external reports, conducting discussions with Spanish banks that put up 80% of the capital, and consulted two law firms in respect of regulatory issues.

- In *Sunreserve v. Italy*, the tribunal held that "the standard of due diligence that investors are expected to adhere to should meet the threshold of what a 'prudent investor' would 'reasonably' do to know about the regulatory framework in question. This standard of reasonable due diligence, as opposed to 'extensive legal investigation', has found the endorsement of many tribunals, including the tribunal in Electrabel v. Hungary . . . and several others in more recent cases."[130]

[126] Stadtwerke München GmbH and others v. Kingdom of Spain, ICSID Case No. ARB/15/1, Award (2 December 2019), para. 264.
[127] Id. at 308.
[128] Antaris Solar GmbH and Dr. Michael Göde v. The Czech Republic, PCA Case No. 2014-01, Award (2 May 2018), para. 360.
[129] Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award (16 May 2018), para. 494.
[130] SunReserve Luxco Holdings SRL v. Italy, SCC Case No. 132/2016, Final Award (25 March 2020), para. 714.

- Regarding the scope of the due diligence requirement, the tribunal in *Hydro Energy v. Spain* explained that "given the State's regulatory powers, in order to rely on legitimate expectations, the investor should inquire in advance regarding the prospects of a change in the regulatory framework in light of the then prevailing or reasonably to be expected changes in the economic and social conditions of the host State."[131] In considering whether it was reasonable to rely on the state's commitment of stability, the tribunal found it "necessary to look at it in the context of . . . the advice which an investor took or should have taken on the nature of the commitment if any."[132]

Other tribunals have held that the right of investors to rely on state commitments was not conditional on a formal or thorough due diligence of the regulatory framework. For example:

- In *PV Investors v. Spain*, the tribunal explained that "whether the Claimants engaged in diligence or not and whether that diligence was 'due' or not, cannot alter the fact that on the basis of the law and the jurisprudence the Claimants knew or should have known that changes to the regulatory framework could happen. As a consequence, expectations that they would not happen cannot be deemed legitimate."[133]

- In *Cube Infrastructure v. Spain*, the tribunal found that "the right to rely upon the representations made in this case do[es] not depend on there being evidence of any particular form or scale of legal due diligence by external advisors."[134] The investors were entitled to rely on representations made by Spain even in the absence of evidence that they had conducted detailed or formal legal due diligence to affirm that the regulatory framework would not be significantly changed retroactively. In the tribunal's view, it was sufficient that the investors had considered the question of regulatory stability, sought expert advice, and reached an understanding of the significance of the representations made by Spain.[135]

[131] Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum (9 March) 2020, para. 600.
[132] Id. at 604.
[133] The PV Investors v. Kingdom of Spain, PCA Case No. 2012-14, Award (28 February 2020), para. 613
[134] Cube Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No. ARB/15/20 Decision on Jurisdiction, Liability and a Partial Decision on Quantum (19 Feb 2019), para. 396.
[135] Id.

- In *SolEs Badajoz v. Spain*, the tribunal considered that "a formal due diligence process [was] not a precondition to a successful claim of legitimate expectations."[136] The tribunal explained, however, that "an investor cannot benefit from gaps in its subjective knowledge of the regulatory environment because, under an objective standard, the investor's legitimate expectations are measured with reference to the knowledge that a hypothetical prudent investor is deemed to have had as of the date of the investment."[137]

g. Conclusions relevant for future climate-related claims under the ECT

None of the 64 available awards involved an investor claim challenging state action taken for purposes of climate action, decarbonization or energy transition. This means that no ECT tribunal has yet been required to weigh the treaty's investment protections against the host state's right to regulate for climate and energy transition. As discussed in previous sections of this report, however, the first such claims have already been filed against The Netherlands, and it is anticipated that more will be filed in the coming years as foreign investors in the fossil sector are affected by regulatory measures implemented to meet commitments under the Paris Agreement and obligations under EU law.[138]

In claims by foreign investors in the fossil sector, tribunals will likely be required to consider (1) whether regulations to phase out fossil fuel amounts to indirect expropriation, (2) whether and to what extent the investors were entitled to legitimate expectations of stability in the regulatory framework applicable to fossil-based energy investments, and (3) whether the investors had conducted sufficient due diligence into the host states' energy transition policies and international climate commitments. Because no direct precedent exists in such disputes, parties and tribunals may look to analogous cases, such as those in this section, in which tribunals have weighed the ECT investor protections against the host state's right to regulate in other areas.

[136] SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Award (31 July 2019), para. 331.
[137] Id.
[138] RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4; and Uniper Benelux N.V. v. Kingdom of the Netherlands, ICSID Case No. ARB/21/22. Although little information is available about these cases, it is known that the investors are challenging the 2019 "Law Prohibiting the Use of Coal for the Production of Electricity", which phases out all coal plants by 2030.

With regard to *indirect expropriation*, the threshold set in the jurisprudence is very high, requiring in effect that the investor be deprived of effective control of its investment, or for the investment to be deprived, in whole or significant part, of its value. Whether fossil investments affected by regulations to reduce emissions will meet this high threshold will depend on the nature of the investment and the facts and circumstances of the case. The jurisprudence suggests that if the investor remains in control of the investment, and the investment continues to generate revenue, a claim of indirect expropriation will rarely be successful.

With regard to the *FET standard and legitimate expectations*, it is difficult to predict how these principles will apply in fossil phase-out disputes, because the reviewed awards present divergent and inconsistent assessments based on similar facts and the same ECT provisions. Some tribunals found that a foreign investor is entitled to legitimate expectations of legal stability based on the laws in place at the time of investment. Other tribunals rejected that idea, stating instead that investors cannot expect regulatory stability in the absence of a specific commitment to that effect. The *Masdar* tribunal characterized these as "two schools of thought" on the question of legitimate expectations.[139] Which of these two schools of thought will gain traction in cases relating to fossil investments remains to be seen.

Where tribunals held that legitimate expectations of stability do not require a specific commitment to that effect, the analysis typically emphasized not only the nature of the adverse regulatory measure, but also its impact on the foreign investment. In other words, the tribunals weighed, or balanced, the public policy objective of the regulatory measure against the interests of the foreign investor. Such a balancing exercise will likely be

"The jurisprudence suggests that if the investor remains in control of the investment, and the investment continues to generate revenue, a claim of indirect expropriation will rarely be successful."

[139] Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award (16 May 2018), para. 490.

central in future phaseout cases. It remains to be seen how tribunals will assign weight to the public policy objective of reducing global warming and mitigating the effects of climate change.

Although future parties and tribunals are likely to reference prior awards in regulatory disputes, they may also consider the renewable energy cases inapposite to the fossil-phaseout cases. This is because the renewable energy cases involve amendments to previously enacted incentive schemes, whereas the fossil-phaseout cases are more likely to challenge *new* regulations where previously there were none. In all the renewable energy cases, whether they required a specific commitment of stability or not, significant weight was placed on the fact that states had actively sought to attract the investors. It is therefore not clear whether the situation of fossil investors would be sufficiently analogous to rely on awards in prior regulatory disputes.

With regard to due diligence, there is no standard universally recognized by tribunals, but most tribunals appear to agree that: (1) investors cannot benefit from subjective knowledge gaps, (2) regulatory changes must not be foreseeable, and (3) legitimate expectations must be based on a reasonable investor's objective understanding of the legal framework. In *ESPF v. Italy*, the tribunal emphasized that the host state's international law obligations were part of that legal framework.[140] In remains to be seen how tribunals will consider the due diligence requirement in fossil phase-out claims.

[140] ESPF Beteiligungs GmbH v. Italian Republic, ICSID Case No. ARB/16/5, Award (14 September 2020), para. 513.

8. AMICUS CURIAE

Have third-party stakeholders intervened on issues of energy transition?

Amicus curiae, or "friends of the court," are third parties that intervene in the proceedings with the view of assisting the tribunal on some of the aspects of the case, such as treaty interpretation. The intervention can be in the form of written submissions and participation at hearings. *Amicus* curiae participation in investment arbitrations dates back to 2000, when several NGOs participated jointly in *Methanex v. USA*, a case under the North American Free Trade Agreement (NAFTA).

As illustrated in this section, ECT arbitrations have not yet seen a wide variety of *amicus curiae*. In July 2021, however, a group of NGOs applied to participate as amicus curiae in *RWE v. The Netherlands*, one of two recently filed fossil-phaseout cases.[141] In a letter expressing their interest to intervene, they offer to assist the tribunal in understanding recent international law developments in relation to climate change and human rights.[142]

a. Standards for amicus intervention under the applicable arbitration rules

Under the ECT, an investor can bring claims under the Rules of the International Centre for Settlement of Investment Disputes (ICSID), the Arbitration Rules of the Stockholm Chamber of Commerce (SCC), or the UNCITRAL Arbitration Rules.

The ICSID Arbitration Rules regulate two types of participation by non-parties: Rule 37(2) governs the filing of a written submission, and Rule 32(2) governs the attendance at hearings. Similarly, Article 3 of Appendix III of the 2017 SCC Arbitration Rules provide for third-party participation, regulate the application to intervene, and stipulate factors to be considered by tribunals in allowing such interventions.

[141] RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands, ICSID Case No. ARB/21/4.
[142] Letter of Expression of Interest of ClientEarth, ECCHR and others in Exploring Amicus Curiae Participation, 19 July 2021, available at https://jusmundi.com/en/document/other/en-rwe-ag-and-rwe-eemshaven-holding-ii-bv-v-kingdom-of-the-netherlands-letter-of-expression-of-interest-in-exploring-amicus-curiae-participation-monday-19th-july-2021 (accessed 3 February 2022).

Unlike the ICSID and SCC Rules, the UNCITRAL Rules contain no express provisions on *amicus curiae* submissions. Article 17(5) of the 2010 UNCITRAL Arbitration Rules states that third persons can join as a party to the arbitration only if they are a party to the arbitration agreement. In 2013, UNCITRAL adopted the Rules on Transparency in Treaty-based Investor-State Arbitration ("UNCITRAL Transparency Rules"), a separate set of rules that provide for, among other things, *amicus curiae* participation. The Transparency Rules apply in disputes initiated under the UNCITRAL Arbitration Rules pursuant to treaties concluded after 1 April 2014, unless the parties to the treaty opt out.

The abovementioned rules all contain similar stipulations for the participation of non-disputing parties in arbitration proceedings. The party seeking to participate must petition the tribunal for leave to intervene; and only if the tribunal grants that application, may the party file a submission. In deciding whether to allow the intervention, the tribunal must inquire whether the third party has a "significant interest" in the dispute, whether the third party would assist the tribunal in determining a factual or legal issue related to the proceeding, and whether the third party has particular knowledge or insight that is distinct from that of the disputing parties. These standards are subjective, meaning that tribunals have wide discretion to decide whether or not to allow third parties to participate as *amicus curiae*.

b. Amicus curiae in ECT awards

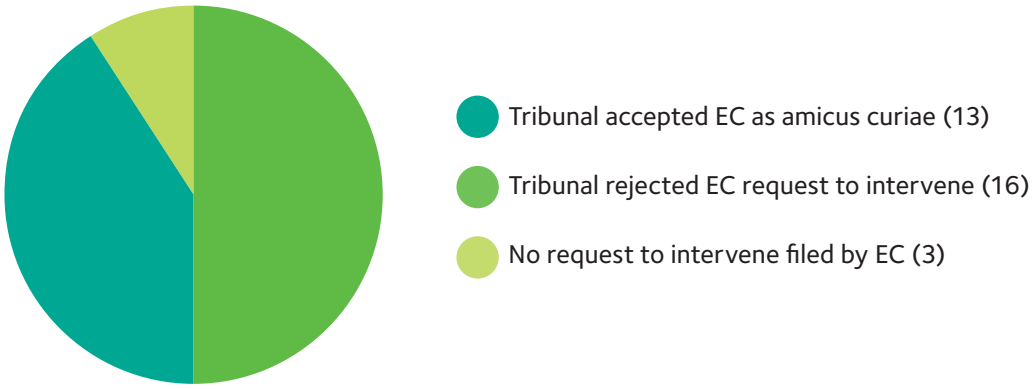
The only third party that has intervened in concluded cases under the ECT is the European Commission (EC). From the 64 awards reviewed in this study, it cannot be detected whether any other third parties have applied to intervene. The interviewed stakeholders were not aware of any non-EC *amicus curiae* applications in ECT cases.

The EC first sought to intervene in *Electrabel v. Hungary* and *AES Summit v. Hungary*. In the *Electrabel* case, the tribunal laid down parameters for the scope of the submission, although the permitted scope of the Commission's submissions went beyond mere issues regarding the interpretation of the ECT.

The EC also applied to intervene as *amicus curiae* in 29 out of 32 renewable energy cases against Spain, Italy and the

Czech Republic. The cases were all intra-EU disputes, and the EC intervened to advance the argument that the tribunal lacked jurisdiction because an arbitration clause cannot remove an intra-EU investment dispute from the EU legal order. In 13 cases, tribunals granted the EC permission to intervene. For example, in *Charanne v. Spain* under the 2010 SCC Arbitration Rules, the Commission was granted the opportunity to make submissions but was not given access to the case file or hearings. In 16 cases, the Commission's application to intervene was rejected by the tribunal or withdrawn for cost reasons. For example, the tribunal in *RREEF v. Spain* twice rejected the Commissions' applications to intervene. In *Eiser v. Spain*, the tribunal allowed the Commission to make a submission contingent on its willingness to pay the additional costs of legal presentation reasonably incurred by the parties in responding to the EC submission.[143] In the latter instance, the EC withdrew because it was unwilling to assume the additional costs.

FIGURE 6: EUROPEAN COMMISSION INTERVENTION IN CASES RELATING TO RENEWABLE ENERGY INCENTIVE SCHEMES



c. Amicus curiae under other international investment treaties

Amicus curiae is not a new phenomenon in investment arbitration. According to one study, already by 2019 there had been at least 94 decisions on *amicus* requests in disputes under a variety of investment treaties.[144] In most cases, no information was available as to the identity of the petitioner or the outcome of

[143] Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award (4 May 2017), para. 68 –70.
[144] Eric de Brabandare, *Amicus Curiae Intervention: From NAFTA to the Intra-EU Saga*, Grotius Centre Working Paper Series No. 2020/090-IEL, 31August 2020, available at https://ssrn.com/abstract=3683686 (accessed 10 December 2021).

the application, but at least 25 petitions were known to have been submitted by NGOs, civil society organizations, individuals, business corporations, and international organizations.[145]

Some cases under the North America Free Trade Agreement (NAFTA) provide examples on how NGOs and local communities, as amicus curiae, have brought environmental and human rights perspectives into investment arbitration.

Methanex v. USA was the first case where a NAFTA tribunal accepted an *amicus curiae* submission. The investor was a producer of methanol, an ingredient of the gasoline additive MTBE. California passed legislation prohibiting MTBE, which was making its way into drinking water sources and injuring human health and the environment. The investor challenged the MTBE ban under NAFTA's investor protections. Several NGOs submitted an *amicus brief* alerting the tribunal to the fact that California was obligated under international law to protect human rights and the environment. The tribunal accepted the submission, noting that "there [was] an undoubtedly public interest in this arbitration".[146] In its final award, the tribunal dismissed all claims and ordered Methanex to pay all arbitration costs.

Glamis Gold v. USA concerned an application by a mining company to develop an open-pit mine in California. The investor claimed that California regulations banning open-pit mines to protect the Native American cultural heritage sites amounted to an indirect expropriation of its investment. Three *amicus curiae* were allowed to make submissions – a coalition of NGOs, a business association, and a Native American Quechan tribe. The Quechan tribe asserted that "the preservation and protection of indigenous rights in ancestral land is an obligation of customary international law which must be observed, by both the NAFTA Parties and any treaty interpreter, in accordance with the principle of good faith."[147] The tribunal found no breach of NAFTA's investor protections.

In addition to NGOs and local communities, international organizations have intervened as *amicus curiae* to alert the tribunal to

[145] Id.
[146] Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae' (15 January 2001), para. 49.
[147] Glamis Gold Ltd. V. United States of America, Submission of the Quechan Indian Nation (16 October 2006), page 1.

the respondent state's commitment under an international legal framework. For example, the Pan-American Health Organization and the World Health Organization (WHO) were allowed to intervene in *Philip Morris v. Uruguay*, an ICSID case under the Switzerland-Uruguay bilateral investment treaty. The dispute concerned Uruguay's tobacco control measures, which required graphic health warnings on cigarettes. The WHO provided evidence on the impacts of tobacco packaging and labelling measures and explained the relevant international legal framework. The tribunal explicitly relied on the *amicus* submissions as evidence when evaluating the reasonableness of the measures, and all claims were dismissed.

d. Conclusions relevant for future climate-related claims under the ECT

In investment arbitration generally, *amicus curiae* participation by NGOs or other public interest actors is an established practice. Practice under other treaties show that third parties may intervene in investment arbitration proceedings to alert the tribunal to the environmental, human rights and public health aspects or impact of the dispute.

In disputes under the ECT, however, there have been no such interventions. The only third party to express an interest in the proceedings has been the European Commission on issues of jurisdiction. The joint application by several NGOs to intervene in the recently filed *RWE v. the Netherlands* may signal a shift in ECT arbitration practice toward increased third-party participation.

Although *amicus curiae* submissions have the potential to alert tribunals to the host state's obligations under international climate and human rights law, some ECT stakeholders interviewed for this study expressed doubt whether such submissions have any real impact on tribunal decision making.

9. CONCLUSIONS

The purpose of this study was to better comprehend the ECT's effect on energy transition to date, and to hypothesize, based on the jurisprudence, how future tribunals might approach fossil phase-out cases. To that end, the study mapped climate and energy transition issues in the ECT jurisprudence, and explored how tribunals have weighed the ECT investor protections against other treaties and against the state's right to regulate.

Different stakeholders may draw different conclusions from the findings presented in this report. For example:

States

- State obligations toward foreign investors under the ECT may conflict with their obligations under the Paris Agreement, EU law, and human rights law. Arbitral tribunals have the power to integrate these two areas of international law or to decide that one trumps the other.

- The ECT's investor protections are broadly drafted and leave it up to tribunals to set the boundaries for state regulatory conduct. States may find that to provide certainty, treaty revision or withdrawal is necessary.

- Tribunals will not on their own initiative engage with the climate aspects of a dispute, or consider the possible conflicts between investor protections and the host state's climate obligations. These issues must be raised and argued by the parties in their submissions.

Investors

- Previous awards in regulatory disputes may not be sufficiently analogous to predict how tribunals will rule in future cases challenging regulations passed to reduce carbon emissions. This leaves investors with uncertainty until the first fossil phase-out cases are decided, and possibly also thereafter.

- Although tribunals differ on the issue of legitimate expectations, they generally agree that regulatory changes that were foreseeable at the time of investment do not breach the FET standard. In light of the evolution of international climate law over the past three decades, regulatory measures to phase out fossil fuels may be considered foreseeable.

- Tribunals have consistently dismissed indirect expropriation claims where the investor remained in control of the investment and the investment continued to generate revenue. Even if such claims were to succeed, there would be uncertainty around the valuation of fossil-related assets in a rapidly decarbonizing economy.

Arbitrators

- Arbitrators will continue to play an important role in interpreting the investor protections and deciding how they apply, including in the context of climate change and energy transition.

- Article 26(6) ECT and the VCLT require tribunals to interpret the investor protections in alignment with "any relevant rules of international law." This requirement may necessitate a balancing of the ECT's investor protections against the host state's obligations under international climate and human rights law.

- In cases challenging regulations designed to phase out fossil fuels, the relevance of precedent set in previous regulatory disputes – most of which concerned changes in renewable energy incentive schemes – is unclear.

Civil society actors

- To date, only the European Commission has participated as *amicus curiae* in arbitrations under the ECT. In future cases relating to climate and energy transition, civil society actors can serve to alert tribunals to the environmental, human rights and public health aspects of the dispute. The application of several NGOs to intervene in the first fossil phase-out case indicates a shift in this direction.

- Civil society actors may also be able to help states and investors avoid arbitration. They can, for example, facilitate open dialogue among stakeholders and provide expertise and best practices for states to regulate for energy transition without incurring liability under investor protections.

ABOUT THE AUTHORS

The authors are co-founders of Climate Change Counsel, a Stockholm-based think-and-do-tank with a mission to use the law to accelerate solutions to climate change and to mobilize lawyers for climate action.

Anja Ipp
Anja is a U.S.-trained lawyer with experience in international dispute resolution, development cooperation and policy research. Before co-founding CCC, Anja worked as legal counsel at the Arbitration Institute of the Stockholm Chamber of Commerce and as an associate in the international disputes practice at Jones Day in New York. She also spent six years in the international development sector, including two years at a think tank in Afghanistan. Anja earned her J.D. from Columbia University, where she was a Paul and Daisy Soros Fellow and recipient of the Parker School Certificate in International and Comparative Law.

Annette Magnusson
Annette was Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce between 2010 and 2021. She has more than 20 years' experience of international law, including from global law firms. She is the founder of the crowd-sourcing initiative Stockholm Treaty Lab, which short-listed for the Financial Times Innovative Lawyers Award in 2017. Annette is a frequent speaker on international law and climate change and has been listed as a Thought Leader and Global Leader in Who's Who Legal, and "a thought leader and global star" by Global Arbitration Review.

Andrina Kjellgren
Andrina is a lawyer with experience in international development and project management. Most recently, she worked with the World Health Organization in Indonesia, advising on the integration of human rights perspectives in health programmes. At the Stockholm Chamber of Commerce in 2014-19, she conducted research on the interplay between international law and environmental protection. She previously worked at a leading law firm in Indonesia, specializing in renewable energy. Andrina holds an LLM in Environmental Law from Stockholm University.