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New report: Issues of climate change and energy transition absent from Energy Charter Treaty jurisprudence

A new report shows that issues of climate change and energy transition have been absent from arbitral awards under the Energy Charter Treaty – arguably the most important trade and investment agreement in the energy sector. The Stockholm-based think tank Climate Change Counsel has conducted a comprehensive study of the jurisprudence.

All member states of the Energy Charter Treaty (ECT) have signed the Paris Agreement and committed to significant reductions in carbon emissions in the next decade. To meet those commitments, states may pass new laws and regulations that affect foreign investments protected under the ECT. In 2021, two ECT cases were filed by foreign investors against the Netherlands, challenging the country's new law to phase out coal.

“The aim of the study was to map climate and energy transition issues in the ECT caselaw, and to see whether and how tribunals have weighed the treaty's investor protections against obligations under other treaties,” says Anja Ipp, CCC co-founder and principal author of the report. “Many anticipate a wave of ECT cases challenging state regulatory actions adopted to phase out fossil fuels, and we wanted to see if there was anything in past awards that would predict or inform the outcome of these ‘phase-out cases’,” says Ipp.

The study reviewed 64 of 75 known arbitral awards rendered under the ECT before August 2021. While 20 of the awards related to fossil-based energy investments, none touched on issues of climate change, energy transition, or climate-law obligations. Such issues were mentioned only as background in the 32 awards that related to incentive schemes in the renewable energy sector.

“Starting very soon, arbitral tribunals will have to interpret the ECT's investment protections in light of states' international climate law obligations,” says Anja Ipp. “Arbitrators will have to decide, for example, whether investors in the fossil sectors could have ‘legitimate expectations’ that the applicable regulatory framework would remain unchanged.”

The report includes summaries of awards and examples of tribunal analysis that may serve, by analogy, as precedent in future climate-related cases. One section explores the interaction between the ECT and other treaties. Another section focuses on so-called regulatory disputes – cases in which tribunals have had to weigh the interests and expectations of foreign investors against the host state's right to regulate.

The report also highlights the absence of third-party intervention in cases under the ECT. Participation by NGOs or other public interest actors as *amicus curiae* (“friends of the court”) is relatively common under other investment treaties, but only the European Commission has intervened under the ECT.

Climate Change Counsel is a small think-and-do-tank with a mission to mobilize the law and lawyers for climate action. The organization advocates for reform and reinterpretation of international investment law, assisting in strategic climate litigation, and mobilizing lawyers for climate action. One of the three co-founders, Annette Magnusson, was previously secretary general of the Arbitration Institute of the Stockholm Chamber of Commerce, one of three approved venues for investor-state arbitration under the ECT.

The report “The Energy Charter Treaty, Climate Change and Clean Energy Transition: A Study of the Jurisprudence” is available on the CCC website: <https://www.climatechangecounsel.com/projects-3>

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