Expecting Regulatory Stability in a Changing Climate

The Legitimate Expectations Argument in ISDS Cases Under the Energy Charter Treaty

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ABSTRACT

Now that the last-ditch modernization effort of the Energy Charter Treaty has been rejected, the survival of the treaty is precarious at best. The European Commission, along with the most influential EU Member States, calls for a coordinated withdrawal from the treaty, claiming that it stands in the way of the European Union's ability to meet its climate targets under the Paris Agreement.

At the heart of the issue surrounding the Energy Charter Treaty's impact on climate policy lies its Investor-State Dispute Settlement Provision, allowing foreign investors to circumvent the domestic court system and go straight to arbitration when they feel their rights have been violated. In the past, arbitral tribunals have ruled in favour of foreign investors on the grounds that their legitimate expectations of regulatory stability were violated because of a state's policy changes. Critics of this mechanism have claimed that the vast amounts of damages awarded in such cases could lead to a chilling effect, preventing states from enacting policy for the common good. Especially in the context of climate change policy, where governments need to implement sweeping changes at short notice, the Energy Charter Treaty's Investor-State Dispute Settlement mechanism has been identified as an obstacle to efficient climate policy.

This contribution starts with putting the ECT and its Investor-State Dispute Settlement provision into context with regard to its impacts on climate change. This reveals that the concept of legitimate expectations is a cornerstone in this discussion, both impacting cases initiated by fossil fuel investors and renewable energy investors. By analyzing these cases both qualitatively and quantitatively, it then attempts to establish to what extent legitimate expectations arguments are accepted by tribunals. This leads to an answer to the question to what extent withdrawing from the Energy Charter Treaty will impact climate policy throughout the EU. The advanced position is that current impacts might have been overstated in past research dealing with the concept of legitimate expectations, as there are very few climate-related cases in which tribunals award damages on the grounds of violating this concept.

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Maintenant que l'ultime effort de modernisation du traité sur la Charte de l'énergie a été rejeté, la survie du traité est pour le moins précaire. La Commission européenne, ainsi que les États membres de l'UE les plus influents, appellent à un retrait coordonné du traité, affirmant qu'il fait obstacle à la capacité de l'Union européenne à atteindre ses objectifs climatiques dans le cadre de l'Accord de Paris.

Au cœur de la question entourant l'impact sur la politique climatique du traité sur la Charte de l'énergie se trouve son mécanisme de règlement des différends entre investisseurs et États, qui permet aux investisseurs étrangers de contourner le système judiciaire national et de recourir directement à l'arbitrage lorsqu'ils estiment que leurs droits ont été violés. Par le passé, des tribunaux arbitraux ont statué en faveur d'investisseurs étrangers au motif que leurs attentes légitimes en matière de stabilité réglementaire avaient été violées par les changements de politique d'un État. Les détracteurs de ce mécanisme ont affirmé que les montants élevés des dommages-intérêts accordés dans de telles affaires pourraient avoir un effet dissuasif, empêchant les États d'adopter des politiques dans l'intérêt commun. En particulier dans le contexte de la politique de lutte contre le changement climatique, le mécanisme de règlement des différends entre investisseurs et États du traité sur la Charte de l'énergie a été identifié comme un obstacle à une politique climatique efficace, parce que les gouvernements doivent mettre en œuvre des changements radicaux à brève échéance.

Cette contribution commence par replacer le traité sur la Charte de l'énergie et sa disposition relative au règlement des différends entre investisseurs et États dans leur contexte en ce qui concerne leur impact sur le changement climatique. Il en ressort que le concept de confiance légitime est une pierre angulaire de cette discussion, tant pour les affaires initiées par les investisseurs en combustibles fossiles que pour celles initiées par les investisseurs en énergies renouvelables. En analysant ces affaires à la fois qualitativement et quantitativement, il tente ensuite d'établir dans quelle mesure les arguments de confiance légitime sont acceptés par les tribunaux. Cela conduit ensuite à une réponse à la question de savoir dans quelle mesure le retrait du traité sur la Charte de l'énergie aura un impact sur la politique climatique dans l'ensemble de l'UE. La position avancée est que les impacts actuels pourraient avoir été surestimés dans les recherches antérieures traitant du concept de confiance légitime, car il y a très peu d'affaires liées au climat dans lesquelles les tribunaux accordent des dommages-intérêts en raison d'une violation de ce concept.

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LIST OF ABBREVIATIONS

BIT	Bilateral Investment Treaty
BSU	Behörde für Stadtentwicklung und Umwelt
CDU	Christlich Demokratische Union Deutschlands
ECT	Energy Charter Treaty
EU	European Union
FET	Fair and Equitable Treatment
ICSID	International Centre for the Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
MFN	Most Favoured Nation
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law

INTRODUCTION

There has been much academic debate, at times even public outcry, about Investor-State Dispute Settlement ('ISDS') in recent years. Almost every important international investment treaty in force today contains an ISDS clause, permitting foreign investors to bring a case before an international tribunal when they feel they have been discriminated against by the Host State. Such provisions allow investors to circumvent the domestic court system, in favour of a more efficient procedure through international arbitration. In addition to greater efficiency, foreign investors often prefer arbitration because the arbitrators in international investment tribunals are further removed from the issue at hand, which makes them less susceptible to political influences and thus less biased.[1] At least, that is the theory.

More and more criticisms have been raised concerning these ISDS clauses. Among the most important points of criticism are doubts over the objectivity of the arbitrators sitting on the tribunals, the lack of possibility to appeal decisions, the huge amounts of damages awarded to investors, and the inaccessibility of ISDS procedures to domestic investors (ISDS clauses only apply to foreign investors).[2] Proponents of ISDS on the other hand claim that the added protection against discrimination grants foreign investors the security to invest in other countries, especially when it comes to developing countries with a less secure domestic judicial system.[3]

This thesis will focus on a more specific criticism of ISDS provisions. It has been contended that such provisions have an impact on the climate policies that are being enacted by virtually every government around the globe.[4] Since oil- and gas-fuelled power plants are one of the biggest causes of global greenhouse gas emissions, these climate policies often have an impact on the fossil fuel sector and its foreign investors. The ISDS provisions in investment treaties allow those foreign investors to challenge climate measures that affect them before an

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[1] Charles Brower and Sadie Blanchard, "What's in a Meme - The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States" (2014) 52:3 Colum J Transnat'l L 689.
[2] See for example George Kahale II., "Rethinking ISDS" (2018) 44:1 Brook J Int'l L 11 or Marina Kofman, "Investor-State Dispute Settlement Challenges and Reforms" (2018) 25 Austl Int'l LJ 49.
[3] For example in David Collins, "The UK Should Include ISDS in Its Post-Brexit International Investment Agreements" (2017) 14:3 Manchester J Int'l Econ L 301.
[4] Bradly Condon, "Climate Change and International Investment Agreements" (2015) 14:2 Chinese J Int'l L 305.

international arbitration tribunal, on the grounds that they cause unlawful expropriation or treat foreign investors inequitably.

The most important investment treaty in this regard is without a doubt the Energy Charter Treaty (ECT), which entered into force in 1994 and was meant to facilitate cooperation between Western and Eastern European countries when it comes to the energy sector. Different from most bilateral investment treaties (BITs), the ECT is thus only applicable to one specific sector: the energy sector. Much like BITs however, this treaty also contains an ISDS clause making it possible for foreign investors to challenge the energy policies of the signatory countries before an arbitration tribunal.

The substantive ground under which investors challenge climate-related policy measures is, in most cases, Article 10(1) of the ECT. This Article contains, among others, the obligation to accord investors fair and equitable treatment (FET):

> "*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 10(1) of the ECT contains multiple obligations for the contracting parties. Obligations such as the most constant protection and security clause (imposing a duty on the state to protect the normal functioning of the investor's business on a level playing field) and the umbrella clause (the obligation to observe any contractual commitments) are more or less defined and give less room to interpretation.[5] Article 10(1) also contains a non-discrimination clause, which is inherently more vague and overlaps with the fair and equitable treatment standard contained in the same article. The FET standard can be applied more broadly, and the room left to tribunals to apply the standard explains its success. Since the inception of the ECT, the FET standard evolved to be the most-used argument by investors to establish a breach of the Treaty.[6]

Under the FET standard, tribunals have held that investors can rely on their legitimate expectations to require a certain amount of regulatory stability. At the same time, tribunals have held that governments have a sovereign right to enact policy changes and that the legitimate expectations of an investor cannot (always) outweigh this right. Consequently, these two rights often come into conflict with each other, forcing tribunals to find a balance between both.

In some cases, the balance sways in favour of the investors, with tribunals awarding multi-million (and sometimes multi-billion) euros in damages when they hold that the investors' rights have been violated. In the context of the fossil fuel industry, this raises concerns over a possible chilling effect preventing governments from enacting climate policies. In other words, signatory states to the ECT might think twice about enacting policy to reduce emissions from the fossil fuel industry when they realize they could face millions, even billions, in damage claims.[7]

But there is another side to this story. The ECT does not only apply to the fossil fuel industry but also to the green energy sector. An important part of an effective climate change policy is to support renewable energy initiatives. In the EU for example, virtually every member state was looking to incentivize investments in the domestic renewable energy sector prior to the financial crisis of 2008. When the crisis hit, a lot of these member states experienced financial

[5] Kaj Hober, "The Energy Charter Treaty" (2007) 8:3 J Of World Investment & Trade at 330-331.
[6] Sydney Thurman-Baldwin, "Modernizing the Fair and Equitable Treatment Standards in the Energy Charter Treaty" (2020) 28:2 U Miami Bus L Rev at 299.
[7] See for example Claire MacLachlan, "Improving Environmental Protection in Investor-State Dispute Settlement" (2020) 46:1 Colum J Envtl L 179. For the opposing view see Stephan Schill, "Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?" (2007) 24:5 J Int'l Arbitration 469.

difficulty which led some to scale back the previously installed incentive programs for green energy. Countries such as Italy, Spain and the Czech Republic were then faced with multiple, in the case of Spain over 50, ISDS cases brought by foreign investors that had started investing in the green energy sector. Indeed, the ISDS clause of the ECT can also be used to protect investments in green energy projects.

Climate-related cases under the ECT are thus connected to one of two types of policy. Fossil fuel investors challenge regulations aimed at reducing CO_2 emissions, while renewable energy investors object to the withdrawal of previously enacted incentive frameworks around promoting alternatives to fossil fuel. The goal of this contribution is to compare these two types of cases and to determine whether or not the different policy objectives that are attached to them can play a role in the outcome of arbitration proceedings under the ECT. In other words, are legitimate expectations arguments more successful when invoked by fossil fuel investors to safeguard the status quo, or are tribunals more likely to accept such arguments when they are invoked by renewable energy investors when they try to prevent regression?

To answer this question this contribution will proceed with an introduction to the ECT and its most important articles in Part I. Afterwards, Part II moves on to a detailed analysis of six ISDS cases under the ECT.[8] Three of those cases were brought by fossil fuel companies looking to challenge climate policy. The other three show a different application of the ISDS clause in the ECT since they were brought by renewable energy companies looking to prevent the reduction of the green energy incentive framework. Part III proceeds with an analysis of both types of cases in light of the main argument they revolve around: the breach of the fair and equitable treatment (FET) standard and the connected concept of an investor's legitimate expectations. Part III also highlights the conflicting interests of governments, who have a right to enact changes to their policy frameworks. Moving away from the qualitative analysis in the first three Parts, the fourth Part provides some quantitative insights concerning cases that feature legitimate expectations arguments. The goal is to see if the data on those cases supports the hypothesis that tribunals are influenced by the policy rationale behind the regulatory changes

[8] All these cases and the relevant documents attached to them can be accessed through the UNCTAD Dispute Settlement Navigator: investmentpolicy.unctad.org/investment-dispute-settlement.

that give rise to a breach of the legitimate expectations of an investor. Finally, Part V provides an outlook on the future of the ECT. The conflicts of the Treaty with EU law will play a major role in this regard, which raises the question of how this will impact existing and future investments.

I. THE ENERGY CHARTER TREATY

Since its inception in 1994, the Energy Charter Treaty (ECT) has been one of the most important multilateral investment treaties in the world.[9] Promising to promote energy security through the creation of an integrated investment market, the ECT now has fifty-three contracting parties.[10] It has been ratified by fifty States and the European Union.[11] This Part will first look at the original context in which the ECT was established, as well as its initial purpose. Afterwards, the focus will shift to the ECT's Investor-State Dispute Settlement (ISDS) clause and the different types of cases that have been brought to arbitration over the years. The Part ends with a brief overview of the Treaty's current status.

1. Original Context and Purpose

The original idea behind the ECT was to increase cooperation between Eastern and Western Europe within the energy sector.[12] While Russia and many of its neighbouring states were rich in natural resources, many of the Western European countries had to rely on oil and gas imports to provide for their energy needs. This meant cooperation between East and West would be mutually beneficial. Where most other investment treaties cover all economic sectors indiscriminately, the ECT is only concerned with the energy sector. Both fossil fuel activities such as oil, gas and coal and renewable energy sources such as wind and solar power are covered.

Even though climate science was already relatively well-developed by 1994, the policy rationale behind the ECT does not reflect the sense of urgency now surrounding the energy debate. Where the ECT takes a stance of neutrality towards the source of the energy investments it protects (be it fossil fuels or renewable energy), it is now clear that sustainable energy investments should be encouraged from a normative perspective.[13] This has meant

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[9] Clarisse Ribeiro, *Investment Arbitration and the Energy Charter Treaty* (Huntington: JurisNet, 2005) at 55.
[10] See the website of the Treaty: energycharter.org.
[11] *Ibid*. Russia provisionally applied the treaty until 2009, but is no longer doing so. Belarus did not ratify the ECT but applies the treaty provisionally; Norway did not ratify the ECT.
[12] *Energy Charter Treaty*, 17 December 1994, Article 2.
[13] Nathalie Bernasconi-Osterwalder and Martin Brauch, "Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition" (2019) Transnational Dispute Management at 4.

that over time, tensions between the original rationale behind the ECT and current policy objectives have grown larger and larger.

The investment-protection articles of the ECT are found under part III, which contains rights for investors including a fair and equitable treatment (FET) clause, a prohibition of discriminatory measures and a most favoured nation (MFN) treatment clause.[14] These provisions are aimed at limiting the non-commercial risks for investors in the energy sector.[15] These provisions are very common in other international investment treaties, including bilateral investment treaties between European states.[16] In addition to the investment-protection articles under Part III, the ECT also contains provisions on trade, transit of energy, energy efficiency and environmental protection.

2. Investor-State Dispute Settlement Clause

Enforcement, especially in instruments of international law, is always a primary concern when drafting a treaty. To address this problem, the ECT contains an article allowing investors to bring their case before an international tribunal when no amicable resolution can be found.[17] Article 26 of the Treaty states that disputes must be settled amicably if possible. To ensure that the parties try to come to an agreement, the investor cannot submit a dispute to arbitration until three months have elapsed from the date of the request for amicable settlement. Only if no settlement can be reached will the dispute be decided through international arbitration.[18]

There are several different procedures investors can follow to seek an arbitration decision under Article 26 ECT. The International Centre for the Settlement of Investment Disputes (ICSID) rules on arbitration can be applied if both the respondent state and the investor's state have ratified the ICSID convention. If only one of both states has ratified the Convention, the investor can choose to apply the ICSID Additional Facility Rules. Alternatively, the investor can

[14] *Energy Charter Treaty*, Article 10.
[15] Clarisse Ribeiro, *Investment Arbitration and the Energy Charter Treaty* at 156.
[16] Christina Bodea and Fangjin Ye, "Investor Rights versus Human Rights: Do Bilateral Investment Treaties Tilt the Scale?" (2018) 50 B J Pol S at 961.
[17] *Energy Charter Treaty*, Article 26.
[18] Arbitration is but one of the options for investors to enforce their rights, they can also submit claims to the courts of the State where the investment was made, or provide for an alternative way of dispute settlement in an agreement with a State. See *Energy Charter Treaty*, Article 26(2), a to c.

opt to appoint a sole arbitrator or an *ad hoc* arbitral tribunal in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration rules, or they can follow the arbitral rules under the Arbitral Institute of the Stockholm Chamber of Commerce.[19]

States cannot simply withdraw from the ECT to avoid paying damages to investors who have initiated arbitral proceedings under Article 26. However, Article 26(3)(b) allows States to prohibit investors from pursuing arbitration if the dispute has already been submitted to the national courts, or if the investor has opted to bring a claim under a previously agreed upon dispute settlement procedure.[20] Almost half of the States that have ratified the ECT have made such a reservation.[21] Additionally, Australia, Canada, Hungary and Norway have made a reservation pursuant to Article 26(3)(c), not allowing investors to submit a dispute based on a breach of a general (contractual) obligation between that investor and a state (last sentence of Article 10(1)).

Since its inception in 1994, 158 cases have been brought before arbitration under the ECT.[22] This makes the ECT the most widely invoked instrument in investor-state arbitration.[23]

3. Fossil Fuel Cases

Historically, fossil fuel cases have been an important part of arbitral cases under the ECT, with cases initiated by oil and gas companies making up 27% of the 158 cases to date, and coal making up 7%.[24] These cases, and in particular the damages claimed and sometimes awarded in them, are the reason some of the literature is very critical of the ISDS provisions under the ECT, seeing them as an obstacle for states to enact environmental regulation.[25] The ISDS mechanism under the ECT allows fossil fuel companies to scrutinize renewable energy

[19] *Ibid*., Article 26(4).
[20] See *Ibid*., Article 26(2), b.
[21] *Ibid.,* Annex I D.
[22] See energychartertreaty.org/cases/statistics/ (last accessed on 1 November 2023).
[23] investmentpolicy.unctad.org/investment-dispute-settlement
[24] energychartertreaty.org/cases/statistics/
[25] See for example Claire MacLachlan, "Improving Environmental Protection in Investor-State Dispute Settlement" (2020) 46:1 Colum J Envtl L 179.

initiatives and to challenge renewable energy policies under international arbitration law when any of the investor protection articles of the ECT have been violated.

To date, four cases under the ECT's ISDS clause can be identified to have been initiated by fossil fuel companies to challenge climate change measures by states.[26] Even though the other fossil fuel cases have a potential impact on the global climate, they do not strictly relate to climate policy. Rather, these cases revolve around the alleged expropriation of fossil fuel installations,[27] or breaches of contract related to the exploitation of fossil fuel plants.[28] An arbitral decision has been reached in two cases that relate to climate change (*Vattenfall v. Germany*, 2009 and *Rockhopper v. Italy*, 2017).[29] Two others have been discontinued (*RWE v. The Netherlands* and *Uniper v. The Netherlands*, 2021).[30] A wide range of ECT breaches have been alleged in these cases, including indirect expropriation, fair and equitable treatment, discriminatory measures and full protection and security. The substantive arguments in these cases will be further discussed under Part II.

4. Renewable Energy Cases

Where fossil fuel companies used to be responsible for the majority of ISDS cases under the ECT, the growing sense of urgency around climate change and the accompanying policy initiatives have shifted the focus to renewable energy companies in recent decades. As mentioned earlier, fossil fuel-initiated cases make up 34% of ISDS cases under the ECT as of now, but cases initiated by solar energy companies (38%), wind energy companies (8%) and renewable electricity generation companies (11%) now make up the majority of cases.[31]

[26] International Institute for Sustainable Development, *Investor-State Disputes in the Fossil Fuel Industry* (Winnipeg: IISD Press, 2021) at 40. Nuclear energy cases are not included in this category, as they do not emit large amount of greenhouse gasses once in operation.
[27] See for example *Azpetrol v. Azerbaijan* (2006), ICSID Case No. ARB/06/15.
[28] See for example *Liman Caspian Oil v. Kazakhstan* (2007), ICSID Case No. ARB/07/14.
[29] *Vattenfall v. Germany* (2009), ICSID Case No. ARB/09/6 and *Rockhopper v. Italy* (2017), ICSID Case No. ARB/17/14.
[30] *RWE v. The Netherlands* (2021), ICSID Case No. ARB/21/4 and *Uniper v. The Netherlands* (2021), ICSID Case No. ARB/21/22.
[31] energychartertreaty.org/cases/statistics/. An important sidenote is that these numbers are heavily influenced by the over 50 cases initiated against Spain's renewable energy reforms. See Muskaan Singh, "The Incorporation of International Investment Protection Law in Renewable Energy Disputes: The Case of Spain" (2022) 2:5 Indian J Integrated Rsch L 1.

At first sight, it might be unclear how a change in mindset towards *more* investments in renewable energy can lead to a surge in ISDS cases initiated by renewable energy companies. This trend is explained by the global financial crisis of 2008. In the years after that crisis, a lot of States had to make cuts in their budgets, including the budgets for renewable energy incentives. This caused States to amend and reduce the existing legislation around renewable energy policy, which in turn meant the profitability of low-carbon energy production was affected.[32] These reductions in the existing investment framework were then challenged by renewable energy companies, leading to a wave of claims in some States, in particular the ones where the financial crisis had hit the hardest such as Spain and Italy.

As in the fossil fuel cases, a wide range of ECT breaches have been used as foundations for these claims, with a focus in most cases on the concept of fair and equitable treatment.[33] Most of these cases are relatively recent (having only been initiated after the financial crisis of 2008), which means a lot of them are still to be decided. The most interesting cases, both decided and pending, will be discussed in Part II.

5. Modernization Efforts and Withdrawals

A lot has changed since 1994. Both participatory States and (legal) scholars have identified the ECT as an obstacle to renewable energy policy, calling for a complete overhaul of the Treaty or even a withdrawal from it altogether.[34] Since Italy withdrew from the ECT in 2016, multiple countries have expressed their intent to follow suit in the near future. The governments of Poland, Spain, The Netherlands, France, Germany, Slovenia and Luxembourg all announced their intention to withdraw from the ECT, citing that the modernization efforts failed to bring the ECT sufficiently in line with their national and European climate targets.[35] If this wave of withdrawals continues, this would greatly reduce the importance and effectiveness of the ECT.

[32] Ana López-Rodríguez, "The Sun Behind the Clouds? Enforcement of Renewable Energy Awards in the EU" (2019) 8:2 Transntl Envtl L 279.
[33] *Ibid*., 285.
[34] Nathalie Bernasconi-Osterwalder and Martin Brauch, "Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition" (2019) Transntl Dispute Management at 10.
[35] Fédéric Simon, "Another Blow for Energy Charter Treaty as Luxembourg Announces Exit", 20 November 2020, *EurActiv*.

There is no doubt that these criticisms have played an important role in expediting the talks around the modernization of the ECT. In 2017, the Parties to the ECT started discussing amendments to the Treaty to counter these criticisms, update the provisions of the ECT and clarify some of its investment protection standards.[36] The driving force behind the calls for modernization were the EU and its Member States, as they were looking to align the obligations in the ECT with the environmental objectives of the Paris Agreement.[37] After fifteen rounds of negotiations, an agreement in principle was reached at the Energy Charter Conference on 22 November 2022.[38]

Multiple EU Member States were seemingly not satisfied with the outcome of the negotiation process however. Nevertheless, the European Commission went ahead with the proposed modernized ECT and asked the Member States to ratify the agreement in October 2022.[39] But perhaps unsurprisingly given the discontent about the outcome of the negotiations among certain states, the required majority for ratification was not reached.[40] The modernized ECT has since been abandoned as a viable way forward to deal with the criticisms facing the Energy Charter Treaty.

This situation led the European Commission to join the European Parliament and certain Member States in their call for a coordinated withdrawal from the ECT by the EU.[41] Citing the treaty's incompatibility with the EU's climate ambition under the European Green Deal, the Commission proposes all Member States withdraw in a coordinated and orderly manner from the ECT. The caveat attached to withdrawing from the ECT however is the sunset clause contained in Article 47, stating that current investors can rely on the ECT's protection for 20 years after the notification of withdrawal. This was the reason the European Commission

[36] Bart-Jaap Verbeek, "The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?" (2023) 8 Bus and Human Rights J 97.
[37] EU Directorate-General for Trade, "Agreement in Principle Reached on Modernised Energy Charter Treaty", 24 June 2022.
[38] Energy Charter Secretariat, "Public Communication Explaining the Main Changes Contained in the Agreement in Principle", 24 June 2022.
[39] EU Directorate-General for Trade, "Agreement in Principle Reached on Modernised Energy Charter Treaty", 24 June 2022.
[40] EU Directorate-General for Energy, "European Commission Proposes a Coordinated EU Withdrawal from the Energy Charter Treaty", 7 July 2023.
[41] *Ibid*.

initially favoured modernizing the ECT, as this would allow EU Member States to avoid having to deal with the ECT's alleged negative climate impacts for 20 years.[42]

The approach of completely withdrawing from investment treaties is also being followed with regard to intra-EU BITs.[43] Most EU Member States have agreed to terminate all intra-EU BITs, and will not be applying the sunset clauses that would normally engage after termination. It is thus likely that the same will happen with regard to the ECT.

Another factor impacting the precarious future of the ECT are the conflicts between the Treaty and EU law that the European Court of Justice has found. In its *Achmea* and *Komstroy* judgements, the Court held that there exists an overlap between the competencies of ECT tribunals and EU courts when cases exclusively involve parties from within the EU.[44] According to the Court, the ECT's ISDS provision excludes these disputes from the jurisdiction of EU courts in a way that is incompatible with the Treaty on the Functioning of the European Union (TFEU). The TFEU requires member states to establish a system of judicial remedies when courts decide on questions of EU law, which the ECT does not provide.[45] Furthermore, the Court held that ECT tribunals lack the jurisdiction to interpret and apply EU law, as this would pose a threat to the autonomy of EU law.[46]

[42] Dave Keating, "Brussels Pleads with Countries to Stay in the Energy Charter Treaty", 4 November 2022, *Energy Monitor*.
[43] Johannes Tropper, "The Treaty to End All Investment Treaties: The Termination Agreement of Intra-EU BITs and Its Effect on Sunset Clauses", 12 May 2020, *Völkerrechtsblog*.
[44] *Achmea*, European Court of Justice, C-284/16 and *Komstroy*, European Court of Justice, C-741/19. Cases only involve parties from the EU when the claimant has its seat in an EU Member State, and the respondent is another EU Member State.
[45] *Achmea*, C-284/16 at para 56.
[46] Alan Dashwood, "Republic of Moldova v Komstroy LCC: Arbitration under Article 26 ECT outlawed in Intra-EU Disputes by Obiter Dictum" (2021) 47 Eur L R at 136.

II. INVESTOR-STATE DISPUTE SETTLEMENT UNDER THE ENERGY CHARTER TREATY

Now that the Energy Charter Treaty has been put into context, this Part proceeds with highlighting some relevant cases that have been brought under its ISDS provision. Since this contribution focuses on possible differences in the way tribunals perceive cases initiated by fossil fuel investors and cases initiated by renewable energy differences, this Part will feature three cases of each. Where the investors in the fossil fuel cases are looking to challenge policy initiatives aimed at reducing emissions from the fossil fuel sector, they can be seen as wanting to uphold the status quo. The investors in the renewable energy cases on the other hand challenge the withdrawal of policy initiatives meant to incentivise investments in the renewable energy sector. From their perspective, they are thus trying to prevent a return to the high emissions caused by fossil fuels due to a lack of investments in renewables.

Even though the Parts below will mainly focus on the concept of legitimate expectations under the ECT, a broader overview and contextualisation are useful to better understand how tribunals deal with ISDS cases in the energy sector. The summaries of the cases below are thus not limited to a discussion of the investor's respective legitimate expectations.

1. Using the ECT's ISDS Clause to Uphold the Status Quo

The first part of this Part focuses on the fossil fuel side of ISDS cases under the ECT. Two of the cases discussed, *Vattenfall v. Germany* and *RWE v. The Netherlands*, revolve around the construction of new coal-fired power plants. Since both are relatively new, dating from 2009 and 2021 respectively, it comes as no surprise that they are intimately connected to climate change and climate policy. To date, *Vattenfall* is the only concluded arbitration case based on the ECT where climate change policy played a central role.[47] RWE decided to withdraw its case against The Netherlands based on jurisdictional issues, but there are numerous substantive similarities between this case and the *Vattenfall* case. Both cases illustrate the difficult

[47] investmentpolicy.unctad.org/investment-dispute-settlement

balancing act governments have to make between protecting long-term investment interests and pushing for policy change to combat global warming.

The *Rockhopper v. Italy* case is perhaps the outlier in this Part, as it revolves more around environmental concerns (specifically oceanic pollution due to oil spills) than climate change policy. It is nevertheless very useful to analyze this case in the context of the ECT's impact on climate change policy since the arguments developed by both parties are relevant to the cases that focus on climate change. These three cases will be summarized below in chronological order.

1.1 Case I: *Vattenfall v. Germany*

In April of 2009, Vattenfall, a Swedish energy company with activities in multiple European countries, requested arbitration with the International Centre for Settlement of Investment Disputes (ICSID) under Article 26(4), a, ii of the ECT.[48] The request was submitted against Germany since the alleged breaches of the ECT took place in the context of the issuing of permits for a new power plant in Hamburg.[49] In particular, Vattenfall contended that the authority responsible for issuing these permits, the Authority for Urban Development and Environment in Hamburg (*Behörde für Stadtentwicklung und Umwelt*, the 'BSU'), had breached Articles 10(1) (fair and equitable treatment, most constant protection and security and no discriminatory measures) and 13 (no indirect expropriation of investments).[50] The company demanded 1.4 billion euros in compensation for the damages.

1.1.1 Case Facts and Merits

These allegations were made after a long process of delays, suspensions and reversals in the permit-issuing procedures for the to-be-constructed coal-fuelled powerplant in Hamburg. In 2007, the federal state of Hamburg was governed by a government made up completely of the local CDU party (*Christlich Demokratische Union Deutschlands*, the German Christian-

[48] *Vattenfall v. Germany* (2009), ICSID Case No. ARB/09/6.
[49] *Vattenfall v. Germany* (2009), Request for Arbitration at para 11.
[50] *Ibid*., at paras 52-53.

democrats) which held an absolute majority in the state's parliament.[51] After some hiccups in the administrative process, Vattenfall and the Hamburg government came to an agreement with regard to the power plant. In return for a preliminary start permit, Vattenfall accepted the demands of the government relating to a reduction of the temperature of the cooling water that was to be returned to the river Elbe, the installation of a carbon capture and storage plant and the increase of the output of the district heating infrastructure.[52]

Crucially though, the CDU lost its absolute majority in Hamburg in the 2008 regional elections and entered into a coalition with the Green Party. One of the election promises of the Hamburg Green Party had been to 'do everything to prevent the construction of this huge coal-fired power station'.[53] During the coalition talks, the CDU government extended the time limit for the issuance of the necessary permits as established under German law to keep the Green Party as a possible coalition partner. After all, one of the central election promises of the latter had been to prevent the construction of the new power plant, so granting the final approval for the plant's construction would have likely meant the end of the coalition talks.

With the new government in place, the time limit was extended once more.[54] In September of 2008, the necessary permits were granted but coupled with restrictions. These restrictions, which were mostly concerned with the effects of the power plant on the biodiversity in the river Elbe, meant that Vattenfall now regarded the construction of the plant as economically unviable. According to the Hamburg government, these restrictions were necessary to comply with the EU's Water Framework Directive.[55] Claiming that the whole permit-issuing process had caused considerable damages, Vattenfall requested the above-mentioned arbitration procedure.[56] Even though Vattenfall is arguing that the Hamburg government breached the

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[51] Deutsche Welle, "Mayor von Beust to govern alone after victory in Hamburg election", 29 February 2004, *Deutsche Welle*.
[52] *Vattenfall v. Germany* (2009), Request for Arbitration at paras 20 and 21.
[53] *Ibid.*, para 30.
[54] *Ibid.*, para 33.
[55] Nathalie Bernasconi, "Background Paper on Vattenfall v. Germany Arbitration" (2009) International Institute for Sustainable Development 1.
[56] As prescribed by article 26(1) ECT, Vattenfall attempted to settle the conflict amicably with the German government. These negotiations led to nothing, which allowed them to start the arbitration process three months later. See *Vattenfall v. Germany* (2009), Request for Arbitration at para 46.

ECT with its actions, it is the German federal government that would be held liable under the ECT.

1.1.2 Case Outcome

The Vattenfall case never made it before an arbitral tribunal. Instead, the two parties agreed to resolve the issue amicably. It is unclear from the official documents what exactly led Germany to negotiate with Vattenfall after the procedure before the ICSID was started up; perhaps the different political constellations of the coalitions on the federal level compared to the regional level played a role. But by August 2010, the parties had agreed on the terms of an agreement to resolve the dispute. In exchange for receiving the final permits for the project, Vattenfall agreed to terminate the proceedings before the Hamburg Court with regard to the administrative process on the issuance of the permits. More importantly, it no longer had to comply with the restrictions with regards to the coolant water that accompanied the original permits, nor did it have to set up district heating pipelines as per the agreement reached with the Hamburg government.[57] The only requirement that remained attached to the issuance of the permits was the inclusion of a carbon capture and storage system in the project. This agreement meant the end of the arbitral proceedings.

In conclusion, Vattenfall came out on top after having invoked the ISDS provision of the ECT. The construction of the power plant went from being economically unviable to profitable. On top of that, Vattenfall was able to negotiate a better agreement with the federal German government than the original agreement with the Hamburg government, likely because of the ISDS proceedings that loomed over Germany's head. In the end, the local Green Party's objective of stopping the construction of a coal-fuelled power plant (and the associated greenhouse gas emissions) was not achieved, and the company's interests prevailed.

1.2 Case II: *Rockhopper v. Italy*

In April of 2017, Rockhopper, a multinational energy company with activities in multiple European countries, requested arbitration with the International Centre for Settlement of

[57] *Vattenfall v. Germany* (2009), Agreement at Article 2.

Investment Disputes (ICSID) under Article 26(4), a, ii of the ECT.[58] The request for arbitration was submitted with Italy as the respondent since the alleged breaches of the ECT took place in the context of investments made by Rockhopper in the Ombrina Mare oil and gas field, located off the Italian coast in the Adriatic Sea.[59] Rockhopper contends that the Italian government violated its obligations under the ECT by rejecting its application for a production permit, thus barring them from exploiting the Ombrina Mare oil and gas field.[60] The company demanded over 275 million euros in compensation for the damages, in addition to over 6 million euros for decommissioning costs and almost 84 million euros in pre-award interest.

1.2.1 Case Facts and Merits

Since 2008, and until its final rejection in January 2016, Rockhopper had a pending application for an offshore production permit in the Ombrina Mare oil- and gas field.[61] Throughout the eight years that this application was pending, numerous actions had been taken by the Italian government to either expedite or halt the procedure, leading the claimants to describe the process as 'a rollercoaster ride'.[62] Over the years, the applicants received a positive impact assessment and a ministerial decree holding that the project was compatible with the environmental interests at stake.[63] According to a Presidential Decree of 1994, the government is bound to enact a decree awarding the production concession within fifteen days (in this case on 29 August 2015) from the receipt of such an environmental compatibility decree.[64]

The production concession would never be awarded, however. The deciding factor in the permit's refusal was the passing of a law on 28 December 2015 prohibiting research, prospection and exploitation in waters within a 12-mile limit of the Italian Peninsula. Since Rockhopper's proposed production wells would fall within this 12-mile limit, the claimants'

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[58] *Vattenfall v. Germany* (2009), ICSID Case No. ARB/09/6, at 3.
[59] *Ibid*., at para 5.
[60] More precisely, Rockhopper invoked the principles of impairment, fair and equitable treatment and unlawful expropriation under the ECT, see *ibid.*, at para 183.
[61] Paolo Mazzotti, "Rockhopper v. Italy and the Tension between ISDS and Climate Policy", 21 December 2022, *Völkerrechtsblog*.
[62] *Rockhopper v. Italy* (2017), ICSID Case No. ARB/17/14 at para 97.
[63] *Ibid.*, at paras 124-126.
[64] *Ibid.*, at para 129.

pending application was rejected in 2016. [65] The new law of 2016 did not in fact establish this 12-mile perimeter, as the preceding law of 2010 also contained a 12-mile perimeter. The new law did however abolish the existing exception for applications that were already under review at that time, including Rockhopper's application for the *Ombrina Mare* gas- and oil field.[66] It is thus the removal of this exception that led to the rejection of Rockhopper's application.

According to the claimants, the refusal of the production concession constituted a breach of Article 13 of the ECT, which prohibits governments from unlawfully expropriating foreign investors.[67] Italy on the other hand denied that the refusal constituted expropriation since it was exercising its legitimate police powers without discriminating against foreign investors.[68]

1.2.2 Case Outcome

The Tribunal in *Rockhopper v. Italy* held that Rockhopper's right to be granted the production concession was taken away by the Italian government pursuant to the new law of December 2015. The main point of contention then became whether or not the violation of this right constituted a breach of Article 13 ECT. In this regard, the Tribunal was not convinced by Italy's lawful policy decision argument. It held that Italy did not satisfy the cumulative requirements laid out in Article 13 needed to avoid the consequences of unlawful expropriation.[69] At the core of the Tribunal's decision seems to be Italy's decision in August 2015 to grant a 'positive opinion on the environmental compatibility assessment', which contrasts with the new law enacted just a few months later to prohibit any extraction of oil and gas in a 12-mile radius around the Italian peninsula. The Tribunal held that Italy cannot invoke the precautionary principle as a lawful rationale for this law, since it had determined the environmental compatibility of the project in its decision of August 2015.[70] By determining that Article 13 ECT had been breached, the Tribunal deemed it unnecessary to discuss the alleged breach of the fair and equitable treatment or impairment principles. It awarded Rockhopper 184 million euros in compensation and almost 7 million euros for decommissioning costs.[71]

[65] *Ibid.*, at paras 97(2) and (3).
[66] *Ibid.*, at para 101.
[67] *Ibid.*, at para 187.
[68] *Ibid.*, at para 270.
[69] *Ibid.*, at para 197.
[70] *Ibid.*, at para 198.
[71] *Ibid.*, at para 335.

1.3 Case III: *RWE v. The Netherlands*

In January 2021, RWE, a German energy company with activities in multiple European countries, requested arbitration with the International Centre for Settlement of Investment Disputes (ICSID) under Article 26(4), a, ii of the ECT. The request for arbitration was submitted with The Netherlands as the respondent since the alleged breaches of the ECT took place in the context of investments made by RWE in a coal-burning power plant in Eemshaven.[72] RWE claimed that the Dutch government violated its obligations under the ECT by prohibiting the production of electricity generated by coal, thus barring them from operating the entirely coal-fired Eemshaven power plant. The company demanded over 1.4 billion euros in compensation for the damages, excluding interests.[73]

An almost identical case was filed by Uniper concerning their coal-fired power plant on the Maasvlakte site.[74] The Dutch government and Uniper seem to have come to an agreement since the filing of the case with the ICSID however, because a formal order for the discontinuance of the proceedings was issued by the Tribunal in March 2023.[75] Because of the discontinuance of this case, and its near-identicalness to the *RWE* case, it will not be further discussed at length here.

1.3.1 Case Facts and Merits

Plans for a coal-based power plant in the Dutch municipality of Eemshaven date back to the late 2000s. RWE highlights that the Dutch government was eager to attract investments into the coal-generated electricity sector since it was looking to reduce electricity costs and its dependence on Russian oil and gas.[76] RWE went ahead with the planning and construction of the power plant, which had cost over 3 billion euros upon its completion in 2015. According to the company, successive Dutch governments during that period continued to reaffirm their need for coal-fired power plants.[77] Notably, it even reached an agreement with RWE on the

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[72] *RWE v. The Netherlands* (2021), ICSID Case No. ARB/21/4, Request for Arbitration at paras 1-2.
[73] *Ibid.*, at para 2.
[74] *Uniper v. The Netherlands* (2021), ICSID Case No. ARB/21/22.
[75] *Uniper v. The Netherlands* (2021), Order of the Tribunal Taking Note of the Discontinuance of the Proceedings and Decision on Costs.
[76] *RWE v. The Netherlands* (2021), Claimant's Memorial at paras 74 and 83.
[77] *Ibid.*, at paras 154-163, 199 and 238-240.

closure of five older coal-fired power plants on the condition that 'no further restrictive measures would be taken that would significantly complicate its electricity production'.[78]

According to RWE, the Eemshaven power plant has an expected lifetime of at least 40 years (i.e. at least until 2055). To convince investors of the profitability of such a long-term investment, the Dutch governments before 2017 affirmed that investment conditions would remain stable, and that coal-generated electricity would be exclusively regulated by the EU's emissions trading system.[79]

After the elections in the Fall of 2017, the newly elected Dutch government drafted a Coal Act, meant to prohibit the generation of electricity based on coal. For the plant in Eemshaven in particular, the act meant that it would be able to continue to run on coal for a transition period of 10 years, but would have to change over to another generation source (e.g. biomass) afterwards.[80] RWE argues that this means the economic and technological costs and risks associated with such a changeover would fall entirely on its shoulders. It even contends that running on biomass is economically unviable without state support. Moreover, the Dutch government has repeatedly expressed its intent to phase out the use of biomass to generate electricity over time as well.[81]

The Dutch government replies however that RWE itself has, on multiple occasions, highlighted its goal to make the power plant in Eemshaven run completely on biomass by 2030.[82] Moreover, it emphasizes RWE's intention to become completely carbon neutral by 2040 through the phase-out of fossil fuels,[83] pointing to RWE's announcement in 2020 that it would not operate any coal-fired power plant within the EU by 2030, with the exception of one German plant.[84] It also contends that the RWE's models show biomass can be burnt profitably in a majority of the cases where it would be profitable to burn coal.[85] Moreover, the Dutch

[78] *Ibid*, at para 249.
[79] *Ibid*., at paras 145-151.
[80] *Ibid.*, at paras 285-286 and 301-308.
[81] *Ibid.*, at paras 347-354.
[82] *RWE v. The Netherlands* (2021), Respondent's Counter-Memorial at paras 90-91.
[83] *Ibid*., at para 92.
[84] *Ibid*., at para 93.
[85] *Ibid*., at para 28.

government highlights that the Coal Act is consistent with long-standing policy, as the need to achieve CO2 reductions has been prominent since 1992. A 2002 energy report highlights the goal to have 'no CO2 released in the atmosphere' from fossil-fuel electricity production.[86] Subsequent energy reports stated that coal-fuelled power plants would only be permissible when they do not interfere with the realization of CO2 emission agreements.[87] According to a 2017 Climate report, all coal-fired power plants in the EU should be phased out by 2030 to keep global warming below 2 degrees Celsius.[88] The government of The Netherlands also disagrees with RWE's contention that there was a promise not to regulate beyond the European ETS system. It highlights that The Netherlands has to meet targets under international climate treaties, which means it cannot solely rely on a blanket European system over which it has limited control.[89]

According to RWE, this complete policy reversal constitutes a breach of Articles 10 (stable investment conditions, fair and equitable treatment) and 13 (indirect expropriation), of the ECT. With regard to Article 10, the company contends that it was unreasonable for the Dutch government to enact an outright ban on coal-fired power plants. By not giving RWE the chance to reduce its CO2 emissions, the Coal Act is not suited to achieve its aims. Moreover, the alternative of a biomass-fuelled plant is economically not viable.[90] The Dutch government replied that it never guaranteed RWE it could keep burning coal at the Eemshaven power plant without future restrictions.[91] More importantly, it holds that the Coal Act is a reasonable and proportionate measure, suited to achieve the government's goal of reducing CO2 emissions.[92] Coal-fired power plants are among the largest emissions of CO2 in The Netherlands, which makes the Coal Act a suitable measure to combat climate change.[93]

With regard to Article 13, RWE argues that the Coal Act indirectly expropriates the investments made in the power plant. The plant will be forced to shut down since changing

[86] *Ibid*., at paras 58-63.
[87] *Ibid*., at para 32.
[88] *Ibid*., at para 82.
[89] *Ibid*., at para 39.
[90] *RWE v. The Netherlands* (2021), Claimant's Memorial at paras 419, 452 and 535.
[91] *RWE v. The Netherlands* (2021), Respondent's Counter-Memorial at para 893.
[92] *Ibid*., at paras 971-974.
[93] *Ibid*., at para 981.

over to biomass is not a viable alternative. Since no suitable compensation was offered, passing this Act constitutes indirect expropriation as meant under Article 13.[94] The Dutch government replies that the Coal Act is a valid exercise of The Netherlands' police powers, taking place in a non-discriminatory manner and aimed at the general welfare.[95] Additionally, the Act does not have the effect of an indirect expropriation, because the Eemshaven power plant will continue to have economic value following the adoption of the Coal Act.[96]

1.3.2 Case Outcome

In early November 2023, RWE decided to withdraw its case against The Netherlands. This decision is linked to the argument of the Dutch government that the Tribunal is not competent to decide this case, as both parties are subject to EU law.[97] To that end, the government filed a case with the Higher Regional Court of Cologne to obtain a declaration that RWE cannot start a procedure under Article 26 ECT against The Netherlands. In September 2022, the Court ruled that an arbitral proceeding based on the ECT between two parties that fall under EU law is indeed inadmissible.[98] The case made it to the German Supreme Court in July 2023, where the decision of the Cologne court was upheld.[99] Since this meant proceeding with the arbitration case would be risky at best for RWE, the company decided to withdraw its claims.[100]

These three climate-related fossil fuel cases can now be contrasted with three cases initiated by renewable energy investors. Because the main policy goal behind incentivizing renewable energy projects is mitigating CO_2 emissions from fossil fuels, renewable energy cases are inherently connected to climate change.

[94] *RWE v. The Netherlands* (2021), Claimant's Memorial at paras 473 and 497.
[95] *RWE v. The Netherlands* (2021), Respondent's Counter-Memorial at para 775.
[96] *Ibid*., at para 825.
[97] See Chapter V for a discussion of the jurisdictional conflict between the ECT and the EU.
[98] Higher Regional Court, Cologne, 1 September 2022, No. 19 SchH15/21.
[99] German Supreme Court, 27 July 2023, No. I ZB 75/22.
[100] Jack Ballantyne, "RWE to Withdraw ECT Claim against Netherlands", 3 November 2023, *Global Arbitration Review*.

2. Using the ECT's ISDS Clause to Prevent Regression

Before the economic crisis in 2008, many EU member states put in place an incentive framework to support the development of their renewable energy sectors. The crisis in 2008 brought financial difficulties for many of them, however, which meant that some of those countries were looking to scale down their incentive programs in the years after 2008.[101] This resulted in a number of arbitration proceedings brought under Article 26 of the ECT, three of which will be discussed in detail below.

Although these three cases relate to three different countries (the Czech Republic, Italy and Spain respectively), they can be seen as intimately connected. From the detailed analysis of the cases below, it will become clear that the factual circumstances are very similar in all three. This does not mean however that the different tribunals deciding these cases come to the same conclusion, as balancing investment stability with regulatory sovereignty remains a difficult task. Small differences in the way governments take action, especially when it comes to the promises that are made towards long-term investors, can lead to hugely different outcomes.

2.1 Case I: *Voltaic Network v. Czech Republic*

In May 2013, Voltaic Network, a German energy company with activities in multiple European countries, requested arbitration under the UNCITRAL rules of arbitration.[102] The case is based on breaches of both the BIT between Germany and the Czech Republic, as well as the ECT.[103] In the context of this analysis, the focus will be on the arguments brought forward by the claimants in relation to the ECT. The request was submitted against the Czech Republic since the alleged breaches of the ECT took place in the context of the cancellation of a regulatory incentive regime for the photovoltaic (i.e. solar energy) sector by the Czech government.[104] In particular, Voltaic Network contended that this cancellation constituted a breach of Article 10(1) of the ECT, more specifically of the fair and equitable treatment principle and the

[101] Zoltan Vig, "Legitimate Expectations in the Arbitral Practice of Green Energy Cases under the Energy Charter Treaty" (2021) 62:2 Hung J Legal Stud at 119.
[102] *Voltaic Network v. Czech Republic* (2013), PCA Case No. 2014-20 at paras 1 and 13.
[103] *Ibid*., at para 4.
[104] *Ibid*., at para 3.

prohibition of discriminatory measures. The company demanded 198.5 million euros in compensation for the damages.[105]

2.1.1 Case Facts and Merits

From 1992 onwards, the Czech Republic started incentivizing investments in its renewable energy sector through different initiatives, including tax incentives, preferential treatment in the distribution of electricity and subsidies.[106] It was projected that these incentives would allow renewable energy investors to recover their investments within fifteen years. The then Czech Minister of the Environment explicitly stated that the most important principle behind these incentives was 'the guarantee of a stable feed-in tariff for fifteen years following the launch of the power station into operation'.[107] The fifteen-year payback goal was moreover explicitly guaranteed in the Czech regulation.[108] In late 2008, these incentives combined with the fact that solar panel components had decreased significantly in price meant that the Czech solar energy sector became particularly attractive for foreign investors.[109] In May 2010, Voltaic Network followed suit and decided to invest in the Czech solar power sector.[110]

The boom of the solar power market meant the Czech power network started to become overloaded. To keep connecting new solar parks to the network, power lines would have to be enhanced, meaning electricity prices would surge.[111] Against this background, the Czech government announced it would scale back the incentive program for renewable energy in January 2011.[112] Additionally, a levy of 26-28% was introduced on electricity generated by solar panels for the period from 2011 to 2013.[113] The levy was reduced to 10-11% for the period after 2013.[114] These reductions were challenged before the Czech Constitutional Court, which upheld the reduction measures in a judgement in May 2012.

[105] *Ibid*., at para 125.
[106] *Ibid*., at paras 130-140.
[107] *Ibid*., at para 142.
[108] *Ibid*., at para 462.
[109] *Ibid*., at para 149.
[110] *Ibid*., at para 151.
[111] *Ibid*., at para 158.
[112] *Ibid*., at para 161.
[113] *Ibid*., at para 175.
[114] *Ibid*., at para 178.

2.1.2 Case Outcome

Voltaic Network nevertheless argued that the premature phaseout of the incentive program constitutes a breach of Article 10 ECT. The company contended that the Czech government failed to respect its obligation to accord the investment with fair and equitable treatment.[115] According to Voltaic Network, the investment framework was not stable, and its legitimate expectations were violated.[116] On this issue, the Tribunal held that the primary target of the incentive program was to provide investors with a return of 7% per year over fifteen years.[117] However, this does not imply, according to the Tribunal, that the concrete modalities of the incentive regime were set in stone. Given the changing economic and technical variables regarding the solar power sector, the specific incentive parameters could not remain fixed over time in function of the fifteen-year target.[118] When the economic and technical variables changed in such a way that the returns on investment became much larger than the 7% originally envisioned, the Tribunal found the Czech government did not breach its fair and equitable treatment obligation under the ECT by changing the incentive modalities.[119] According to the Tribunal, the Czech government did not give any specific assurances with regard to the stability of the solar power investment regime either.[120]

Second, Voltaic Network argued that the Czech government acted unreasonably and inconsistently, thus violating the prohibition of arbitrary and discriminatory treatment.[121] Again, the Tribunal disagreed and held that a policy aimed at lowering electricity prices for the benefit of the general public by reducing excessive profits for investors is reasonable.[122] The investors would still get a return on investment of 8.4% per year, meaning the investments remained more profitable than initially promised.[123] The Tribunal also noted that the contested policy was effective in achieving its goals, as it decreased electricity bills for private households by 3.6% while only decreasing returns on investment by 3%.

[115] *Ibid.*, at para 371.
[116] *Ibid.*, at para 374.
[117] *Ibid.*, at para 462.
[118] *Ibid.*, at para 465.
[119] *Ibid.*, at para 494.
[120] *Ibid.*, at para 502.
[121] *Ibid.*, at para 555.
[122] *Ibid.*, at para 604.
[123] *Ibid.*, at para 605.

2.2 Case II: *Greentech e.a. v. Italy*

In July 2015, Greentech, a Danish energy company, and NovEnergia, a Luxembourgish energy company (both with activities in Italy) requested arbitration under the Stockholm Chamber of Commerce rules of arbitration.[124] Their case was based on the alleged breach of Article 10(1) ECT. The request was submitted against Italy since both Greentech and NovEnergia had invested in Italian companies operating solar power plants.[125] Similar to the Czech case discussed above, claimants argued that their investment was based on incentives provided by the Italian government for its domestic solar power sector and that those investments were harmed when the incentive program was diminished.[126] The companies demanded 25.06 million euros in compensation for the damages.[127]

2.2.1 Case Facts and Merits

Starting in 2005, the Italian government began incentivizing investments in the solar energy sector by enacting ministerial decrees which provided for a tariff to be paid out per produced unit of solar electricity. The tariffs were to be paid in addition to the market price and would be granted for twenty years starting from the date of the plant's entry into operation.[128] It was not the Italian state however that bore the costs of these tariffs. As the legislative framework surrounding the incentive program provided that the state was not allowed to provide for the funding of the program, its costs were passed on to the electricity consumers.[129]

Both Greentech and NovEnergia invested in numerous solar energy plants in Italy, which had rights to a range of different tariff rates under the incentive regime (depending on when they were constructed and their size).[130] After the construction of the plant, operators would receive a letter confirming the rate of their tariff, and expressly stating that this rate would

[124] *Greentech v. Italy* (2015), SCC Arbitration No. 2015/095 at paras 1-3.
[125] *Ibid*., at para 12.
[126] *Ibid*., at para 11.
[127] *Ibid*., at para 12.
[128] *Ibid*., at para 109.
[129] *Ibid*., at para 110.
[130] *Ibid*., at paras 136 and 141.

remain constant for twenty years.[131] These modalities would then be formalized into a contract between the operator and the responsible government subsidiary.[132]

Since the costs of this incentive program fell entirely on the shoulders of the consumer, Italy started looking for ways to reduce the tariff rates from 2013 onwards.[133] It did so in numerous ways, including plain tariff reductions, removal of inflation adjustments, imposition of administrative fees and imbalance costs and modifications of minimum guaranteed prices.[134] These reductions were then challenged before the Tribunal by Greentech and NovEnergia.

2.2.2 Case Outcome

The Tribunal found that only the tariff reductions constituted a breach of Article 10(1) ECT, specifically the fair and equitable treatment clause, the impairment clause and the prohibition to violate specific agreements with an investor. This conclusion was primarily based on the 'legitimate expectations' component of the fair and equitable treatment clause. The Tribunal found that, since the Italian government had expressly stated the tariff rates would remain stable for twenty years (both in the decrees and in individual agreements with the investors), the investors could reasonably rely on these promises.[135] It found that Italy's sovereign right to enact legislation was in this case overridden by the repeated and precise assurances made to specific investors, amounting to guarantees that the tariff rates would remain fixed for two decades.[136] The fact that Italy faced economic difficulties at the time was not enough to convince a majority of the Tribunal these circumstances reached the level of *force majeure*.[137]

All the other measures taken to alleviate the burden of the incentive program on the consumer were found to be in accordance with the ECT.[138] Some of them were found to be taxation measures (which are exempt from the application of the ECT),[139] whereas others

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[131] *Ibid.*, at para 127.
[132] *Ibid.*, at para 128.
[133] *Ibid.*, at para 143.
[134] *Ibid.*, at paras 143-170.
[135] *Ibid.*, at para 447.
[136] *Ibid.*, at para 450.
[137] *Ibid.*, at para 451.
[138] *Ibid.*, at para 179.
[139] *Ibid.*, at paras 227 and 233.

were found not to have given rise to any legitimate expectations.[140] The Tribunal awarded claimants 11.9 million euros in damages, excluding interest.[141]

2.3 Case III: *Eurus Energy v. Spain*

In February 2016, Eurus Energy, a Japanese energy company with activities in Europe, requested arbitration with the ICSID.[142] Their case was based on the alleged breach of Articles 10(1) and 13 ECT. The request was submitted against Spain, as the alleged violations of the ECT were caused by the regulatory overhaul of the Spanish energy sector.[143] Similar to the cases discussed above, claimants argued that their investment was based on incentives provided by the Spanish government for its domestic renewable energy sector and that those investments were harmed when the incentive program was diminished.[144] The company demanded 258 million euros in compensation for the damages, including interest.[145]

2.3.1 Case Facts and Merits

Since 1986, the Spanish government has promoted the use of renewable energy by providing investors with the opportunity to obtain a tariff on top of the market price they receive per unit of renewable energy produced. According to Spain, this system was based on the principle of reasonable return: investors should be able to profit in a balanced and proportionate way, with the market prices as reference.[146] Under the system in place from 2004 onwards, wind producers could obtain the market price for the energy they produced, plus a tariff of 40% of that market price.[147] Because the tariff was tied to the market price, and because the market prices rose considerably due to increased oil prices, energy producers were obtaining much higher returns than those envisaged by the Spanish government.[148]

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[140] *Ibid*., at paras 477, 501-502, 518 and 536.
[141] *Ibid*., at para 570.
[142] *Eurus Energy v. Spain* (2016), ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability at para 5.
[143] *Ibid*., at para 135.
[144] *Ibid*., at para 135.
[145] *Ibid*., at para. 446.
[146] *Ibid*., at para 100.
[147] *Ibid*., at para 113.
[148] *Ibid*., at para 115.

From 2007 onwards, instead of being tied to the market price for electricity, tariffs would be updated annually according to the national retail price index. Additionally, a reference tariff was created to establish a predefined range in which future tariffs would fall, to avoid the unforeseen rise in tariffs under the previous system.[149] Wind farms that previously received tariffs based on the old system would continue to do so until 2012, but the tariffs would no longer be updated after 2006. From 2012 onwards, these wind farms would also be subject to the new system.[150]

The incentive system continued to generate sizeable government deficits, however, which amounted to almost 30 billion euro by 2013.[151] This caused the Spanish government to enact more drastic changes between 2012 and 2014.[152] The first change was a new environmental tax of 7 %, applicable to all energy producers.[153] However, the modalities of the new tax regime differed for renewable energy producers: contrary to other producers, they were not allowed to charge the costs associated with this new tax directly to the consumer.[154] In 2013, the tariff system was completely abandoned in favour of a regulated tariff system.[155] The way in which incentives for renewable energy producers were determined changed as well, with the objective of allowing 'a reasonable profitability'.[156]

According to Eurus Energy, these changes violated the ECT in three ways. They constituted an indirect expropriation (Article 13), a breach of the fair and equitable treatment principle (Article 10) and a breach of the most constant protection principle (Article 10).[157] The Tribunal dismissed the claimant's arguments regarding an indirect expropriation, based on two reasons. First, Eurus energy was not deprived of an acquired right. It contended that it had a vested right to a particular remuneration, but the Tribunal found (in accordance with a judgement from the Spanish Supreme Court) that no such right existed.[158] Second, the wind

[149] *Ibid.*, at para 118.
[150] *Ibid.*, at para 119.
[151] *Ibid.*, at para 131.
[152] *Ibid.*, at para 135.
[153] *Ibid.*, at para 136.
[154] *Ibid.*, at para 137.
[155] *Ibid.*, at para 138.
[156] *Ibid.*, at para 139.
[157] *Ibid.*, at para 237.
[158] *Ibid.*, at para 266.

farm plants were not expropriated, their value was merely impaired. They continue to be operated by Eurus Energy and two of the farms still receive subsidies.[159]

2.3.2 Case Outcome

When it comes to the fair and equitable treatment standard, the Tribunal first investigated whether specific commitments were made vis-à-vis Eurus Energy. Because the Tribunal held that no such specific commitments were made by the Spanish government, a secondary question arose: did Eurus Energy have a legitimate expectation that the incentive regime would not change in the way it did? The Tribunal held that the claimant could not reasonably expect the incentive program to remain unchanged.[160] Moreover, it held that the objective behind the changes was reasonable: the deficits created by the incentive programme were unsustainable.[161] Additionally, the promise of a 'reasonable return' was upheld by the Spanish government according to the Tribunal.[162] However, clawing back profits from earlier years (when the old incentive programme was still in force) based on a subsequent court judgement that the profits generated were excessive, was found to be inconsistent with the principle of stability under Article 10 according to the Tribunal. Because this particular claw-back measure was not necessary to resolve the deficit problem, the Tribunal concluded that Spain breached Article 10(1) with this measure.[163]

Since Eurus Energy did not suffer any physical harm, and since the unreasonable and discriminatory aspects of the most constant protection principle were already discussed by the Tribunal, no violation of this principle was found.[164] The Tribunal thus awarded Eurus Energy compensation of 106.2 million euros plus interest for the breach of Article 10(1) ECT. All other claims were dismissed.[165]

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[159] *Ibid*., at para 274.
[160] *Ibid*., at para 319.
[161] *Ibid*., at para 338.
[162] *Ibid*., at para 369.
[163] *Ibid*., at para 355.
[164] *Ibid*., at paras 386 and 388.
[165] *Eurus Energy v. Spain* (2016), ICSID Case No. ARB/16/4, Award at para 158.

III. Legitimate Expectations in a Changing World

The analysis of the six ISDS cases based on the ECT in the previous Part reveals two objectives that are often incompatible with each other. On the one hand, long-term projects are crucial in the energy sector and require a stable investment climate to be funded. The reason why ISDS clauses exist in the first place is to ensure that the (long-term) interests of investors are protected against unilateral changes by governments. But this need for stability often comes into conflict with a government's right to enact policy in the public interest. The question is thus whether ISDS clauses, specifically in the context of climate change and the ECT, protect the stability of investment frameworks without excessively constraining governments.[166]

The interpretation of two intimately connected concepts largely determines the outcome of this question: the fair and equitable treatment (FET) standard and the notion of an investor's legitimate expectations. Since FET arguments in general, and legitimate expectations arguments in particular, feature in the majority of cases under the ECT, decisions on the alleged violation of these concepts can be viewed as one of the most important factors in the outcome of a case. And because both concepts are inherently vague, tribunals have a large margin of interpretation when applying them to a specific set of facts. This is why they provide for more possibilities, compared to the prohibition of unlawful expropriation under article 13 of the ECT for example, for tribunals to consider the government's policy objectives, either explicitly or implicitly.

1. <u>Legitimate Expectations</u>

In the European context, it seems that investors can rely on an extensive framework under national and EU law to protect them against violations of their legitimate expectations. Since Part II has shown that foreign investors still decide to bring cases to an international tribunal rather than a domestic court, the ISDS provision under the ECT is at least in some cases considered more protective of investors' interests than the national (and EU) obligations of

[166] Diego Zannoni, "The Legitimate Expectation of Regulatory Stability Under the Energy Charter Treaty" (2020) 33 Leiden J of Int'l L at 452.

Member States. Article 10(1) of the ECT includes, among other obligations, the obligation to treat foreign investors fairly and equitably. The concept of legitimate expectations is as such not explicitly mentioned in the ECT, nor is it mentioned in any other international investment treaty.[167] Rather, it emerged as a key aspect of the fair and equitable treatment (FET) standard that is often included in such treaties.[168] The FET standard is characterized by its broad field of application and its vague language, which makes its alleged breach the most popular argument invoked by investors to show they have been wronged by a host state.[169]

Since the early 2000s, tribunals have used the notion of legitimate expectations to ground the vagueness of the FET standard.[170] The concept is now consistently recognized as the dominant element of the FET standard.[171] However, the adoption of the legitimate expectations concept has not ended the legal uncertainty surrounding the protective framework of regulatory stability in the context of international investment.[172] Essentially, the concept of legitimate expectations introduces a legal standard to deal with the question to what extent investors can rely on contractual agreements, public statements and administrative decisions by governments.[173]

1.1 Criteria to Determine Whether Legitimate Expectations Exist

Because of the conflict between an investor's interests (regulatory stability) and a government's interests (freedom to regulate), tribunals have to exercise a balancing act when

[167] Arwel Davies, "Investment Treaty Interpretation, Fair and Equitable Treatment and Legitimate Expectations" (2018) 15:3 Manchester J Int'l Econ L at 314.
[168] Over 95% of investment treaties include the FET standard, see Patrick Dumberry, “Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?” (2016) J Int’l Dispute Settlement at 156 and 157.
[169] United Nations Conference on Trade and Development, *World Investment Report 2019* (New York: UN Publications, 2019) at 104.
[170] Niclas Landmann, *Legitimate Expectations and Fair-and-Equitable-Treatment under the Energy Charter Treaty* (Baden-Baden: Nomos, 2022) at 70.
[171] See for example *Saluka Investments v. The Czech Republic* (2001), PCA Case No. 2001–04, Partial Award at para 302 or *Tecmed. v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award at para 154. See more extensively Gian Farnelli, “Recent Trends in Investment Arbitration Concerning Legitimate Expectations” (2021) 23 Int’l Community L Rev at 30.
[172] Michele Potestà, “Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept” (2013) 28:1 ICSID Rev at 89.
[173] Rahmi Kopar, *Stability and Legitimate Expectations in International Energy Investments* (Oxford: Hart Publishing, 2021) at 122-147.

judging arguments that invoke legitimate expectations. To do this, they use a range of criteria that can inform whether one interest outweighs the other or not given a specific set of circumstances. Since the concept of legitimate expectations does not feature in the text of the ECT at all, these criteria were established entirely in the jurisprudence of tribunals. They do not feature consistently in all cases but can be seen as guidelines tribunals use when confronted with specific facts.

1.1.1 Promises Regarding a Stable and Predictable Legal Framework

For there to be legitimate expectations, there must be some kind of promise on which these expectations can be based. Tribunals and commentators alike have discussed at length what kinds of government behaviour can give rise to legitimate expectations on the part of the investor, but given the vague definition of the concept there are no clear standards to determine when legitimate expectations exist. This being said, tribunals do agree on the most extreme cases and often provide guidelines that can be applied to facts in another case.

In the *Voltaic Network* case for example, the primary reason for the Tribunal's dismissal of the claimant's legitimate expectations argument was the absence of *any* assurances with regard to regulatory stability. The Czech government never stated for how long the favourable tax regime would be applicable, nor that the incentive regime would remain unchanged. This led the Tribunal to conclude that the incentive regime could be altered whenever there was economic justification to do so.[174]

In the *Greentech* case, the Tribunal reached the opposite conclusion because explicit assurances had been given by the Italian government. It held the following:

> "*The repeated and precise assurances to specific investors amounted to guarantees that the tariffs would remain fixed for two decades. Italy effectively waived its right to reduce the value of the tariffs*."[175]

[174] *Voltaic Network v. Czech Republic* (2013), PCA Case No. 2014-20 at para 502.
[175] *Greentech v. Italy* (2015), SCC Arbitration No. 2015/095 at para 450.

But even where such repeated and precise assurances have been given with regard to the fixation of an incentive regime in the long term, the Tribunal seemed to be mindful of the State's prerogative to enact policy. It stated that the investor might still have to live with some minor adjustments, but that in this case the assurances given prohibited the Italian government from completely overhauling the regulatory framework.[176]

From these two cases with different outcomes emerges the most important factor in the existence of legitimate expectations: the nature, explicitness and specificity of the promises made by the government at the time the investment was made. The extent of those promises greatly influences the balancing act Tribunals make when they weigh the investor's interest in stability with the government's duty to enact policy in the public interest. The question whether this criterion is fulfilled can thus not be answered in black-and-white. Rather, the extent to which promises are made will likely make a Tribunal lean this way or the other. As stated by arbitrator Sacerdoti in his dissenting opinion in the *Greentech* case:

> "*Under a provision such as the FET clause of the ECT the analysis to be conducted requires therefore balancing between, on the one hand, the framework of stability provided by the host State upon which a foreign investor has in a demonstrable way relied when making its investment, and, on the other hand, the host State's reasons for the changes, respect by it of procedural due process, and the magnitude of the negative impact that these changes have had on the investment. <u>The more stable the framework, the higher the burden for the host State to show that the changes were reasonable and that, on balance, they did not breach the FET clause</u>. Under the FET standard this approach calls for a proportionality analysis between the competing interests of the investor to investment protection and the legitimate interest pursued by the State.*"[177] (emphasis added)

[176] *Greentech v. Italy* (2015), SCC Arbitration No. 2015/095 at para 448.
[177] *Greentech v. Italy* (2015), SCC Arbitration No. 2015/095, Dissenting Opinion of Giorgio Sacerdoti at para 12.

As a general rule, assurances regarding the stability of the investment framework carry more weight the more individualized they are.[178] Thus, a contractual guarantee can be seen as the strongest basis for legitimate expectations from an investor.[179] However, such specific contracts containing assurances concerning the stability of the investment climate are rare.[180] Therefore, investors often rely on unilateral declarations from the host state, for example from a government official or a call for tenders.[181] The more explicit the promises made in those declarations, the stronger the basis for investors they could legitimately rely upon them. Lastly, legitimate expectations can also be based on more general conduct by the host state's government.[182] The legal framework itself, the reasoning behind existing policies or general information provided by them can all inform legitimate expectations.[183]

The different degrees of promises are very clearly highlighted in *Parkerings v. Lithuania*, a case brought under the Bilateral Investment Treaty between Lithuania and Norway:

> "*The expectation is legitimate if the investor received an explicit promise or guaranty from the host State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances*

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[178] Niclas Landmann, *Legitimate Expectations and Fair-and-Equitable-Treatment under the Energy Charter Treaty* (Baden-Baden: Nomos, 2022) at 82-83. See very detailed Rahmi Kopar, *Stability and Legitimate Expectations in International Energy Investments* (Oxford: Hart Publishing, 2021) at 122-147.

[179] *Continental Casualty Company v. The Argentine Republic* (2008), ICSID Case No. ARB/03/9 at para. 261. See also Fulvio Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (The Hague: TMC Asser Press, 2018) at 91. In the context of the ECT, article 10 contains a so-called 'umbrella clause' requiring a host state to 'observe any obligations it has entered into with an investor'. Contractual breaches are thus elevated into treaty breaches, see Diego Zannoni, "The Legitimate Expectation of Regulatory Stability Under the Energy Charter Treaty" (2020) 33 Leiden J of Int'l L at 456-457.

[180] As an added caveat, it has been argued that that the simple frustration of a contractual expectation alone is not enough to constitute a frustration of legitimate expectations under the FET standard. This is consistent with general international law on state responsibility, where a contractual breach is not as such considered a breach of international law. It is unclear however what else precisely is needed on top of a contractual breach in the context of a frustration of legitimate expectations, see Michele Potestà, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept" (2013) 28:1 ICSID Rev at 102.

[181] See the International Law Commissions First Guiding Principle: "Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations".

[182] Michele Potestà, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept" (2013) 28:1 ICSID Rev at 107.

[183] Niclas Landmann, *Legitimate Expectations and Fair-and-Equitable-Treatment under the Energy Charter Treaty* (Baden-Baden: Nomos, 2022) at 83.

surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate." [184]

The Tribunal in *Parkerings v. Lithuania* thus seems to accept the possibility that a state's general conduct could be used as a guide in investment decisions even when there are no explicit assurances directed at one specific project or investor. Since the state did not necessarily want to be legally bound with regard to a specific investment project, the extent to which the investor could rely on such conduct to inform their legitimate expectations depends on the specifics in every case. In *Saluka v. Czech Republic*, the Tribunal is more explicit on the question whether legitimate expectation could exist in the absence of any explicit assurances:

> "*The Tribunal finds that the Claimant's reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance from the Czech Government."* [185]

Some tribunals do not accept implicit circumstances as giving rise to legitimate expectations. In *Philip Morris v. Uruguay* for example, the Tribunal required *specific* undertakings and representations by the host state.[186] Similarly, the Tribunal in *Crystallex v. Venezuela* held that a promise addressed to an investor has to be 'precise as to its content and clear as to its form'.[187]

Separate from this first criterion, two other criteria can be distinguished that are needed for a claim on the grounds of legitimate expectations: reliance and reasonableness. The question whether those two criteria are fulfilled can (in most cases) be answered with yes or no, contrary to the first criterion analyzed above.

[184] *Parkerings v. Lithuania* (2005), ICSID Case No. ARB/05/8 at para 331.
[185] *Saluka Investments v. The Czech Republic* (2001), PCA Case No. 2001–04, Partial Award at para 329.
[186] *Philip Morris v. Uruguay* (2010), ICSID Case No. ARB/10/7 at paras 426 and 429.
[187] *Crystallex v. Venezuela* (2011), ICSID Case No. ARB(AF)/11/2 at para 547.

1.1.2 Reliance on those Promises by the Investor

This criterion is closely linked to the impact of the stability of the investment climate on the investor's decision to invest in a given State or region. There has to be a causal link between the promises of the government concerning the investment climate, and the willingness of the investor to go through with their plans. In other words, the investor has to have relied on the promised stability of the investment climate to make the investment.

In this context, it is very important to determine what the relevant time is for assessing this criterion. Investments in the energy sector by multinational companies are often complex, and it is sometimes hard to determine when exactly the decision to invest was made.[188] In any case, promises made *after* the (majority of the) investment was made cannot be used to claim reliance on legitimate expectations.[189]

Additionally, it is very hard to determine the exact reasons behind a given investment. At the very least, investors have to show that they were aware of the promises made by the government at the time they were thinking about investing. Even then, it could prove difficult to show that those promised were actually relied upon.

In *Voltaic Network*, determining at what date the reliance criterion should have been fulfilled is relatively easy. The Tribunal holds that this should be the date on which Voltaic Network acquired the company through which it became a stakeholder in the Czech renewable energy sector. Beyond this specific date, the months during which the bulk of the funds were invested to construct a new solar plant were also considered relevant.[190]

The abovementioned difficulty of establishing the reasoning behind an investment is very apparent in this case, as the Tribunal decided there was no evidence that the investor relied on promises made by the government. It held:

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[188] Christoph Schreuer and Ursula Kriebaum, "At What Time Must Legitimate Expectations Exist?" in Jacques Werner and Arif Ali, eds, *A liber amicorum: Thomas Wälde* (London: Cameron May Publishing, 2009) at 269.
[189] See e.g. *Joseph Charles Lemire v. Ukraine* (2006), ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability at para 264; *Philip Morris v. Uruguay* (2010), ICSID Case No. ARB/10/7 at para 429; *National Grid v. Argentina* (2003) at para 173 and *Invesmart v. Czech Republic* (2007), at para 202.
[190] *Voltaic Network v. Czech Republic* (2013), PCA Case No. 2014-20 at para 507.

"*The Tribunal has seen no evidential basis that […] the Claimant was, in fact, aware of the statements of the Czech Authorities to which it now refers, or that it actually relied upon them*."[191]

In this case, the Tribunal was thus of the opinion that it is the investor's responsibility to establish a link between the reasoning behind the investment decision and the promises made by the government. Simply referring to the existence of certain assurances is not enough, as this would fall under the abovementioned obligation of providing a stable and predictable legal framework.

1.1.3 Reasonableness of Expectations

Once it has been established that legitimate expectations existed, and that these were relied upon at the time of the investment, it is still necessary to review whether these expectations were reasonable or not.[192] To do this, a Tribunal must take into account all the relevant circumstances surrounding the promises that were made at the time of the investment. As held by the Tribunal in *Duke Energy*:

"*The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State*."[193]

The criterion of reasonableness thus extends beyond the nature of the promises that were made and includes the broader context in the host State at the time the investment was made. Put differently, investors should not be blinded by the assurances that were made by the government if it is clear that those assurances are founded upon circumstances that might very well change in the future.

[191] *Ibid.*, at para 508.
[192] Jorge Viñuales, "Investor Diligence in Investment Arbitration: Sources and Arguments" (2017) 32:2 ICSID Rev 346.
[193] *Duke Energy v. Ecuador* (2004), ICSID Case No. ARB/04/19 at para 340.

More concretely, the Tribunal in *Voltaic Network* held as follows:

> "*[…] the Tribunal finds that already at the relevant time (May to September 2010), there had been an accumulation of apparent warning signs that ought to have precluded any such expectation on the part of the Claimant, and, objectively viewed, did preclude the possibility that the Claimant might be said reasonably to have relied on any such alleged assurances.*
>
> *It was manifest in 2009-2010 that the FiT could no longer be maintained unchanged. It was clear that, for this purpose, the 5% limitation rule would be abandoned for future plants. Moreover, it became evident that the abolition of the 5% limitation for future plants would not, of itself, be sufficient to address what had become an unreasonable and unsustainable support system for plants, which entered into operation in 2009 and 2010. The Tribunal therefore finds that the Claimant was not reasonably entitled to expect that no measures would be taken with regard to the FiT for plants in operation before 2011. The changes that were promulgated were within the reasonable discretion of the State*."[194]

In this case, changing economic conditions were taken into account by the Tribunal to conclude that the investor should have reasonably expected (limited) adaptations to the regulatory framework in the future. Even though it was impossible to predict how the economic conditions would change in the years after the investment was made, the investors should not have expected them to remain completely stable.

However, the criterion of reasonableness must again be judged against the backdrop of the specific promises that were made. The more specific and explicit those promises are, the more likely it will be that a Tribunal will accept an investor's expectations as reasonable, even if certain circumstances change.[195] As an extreme example, imagine that a State assured an

[194] *Voltaic Network v. Czech Republic* (2013), PCA Case No. 2014-20 at paras 515-516.
[195] Yulia Levashova, *The Right of States to Regulate in International Investment Law: The Search for Balance Between Public Interest and Fair and Equitable Treatment* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2019) at 166.

investor that the tariff they would receive above the market price per unit of electricity produced would remain stable, even if the market price should rise substantially in the following years. That State cannot argue afterwards that the legitimate expectations of the investor were unreasonable, because the possibility of changing economic conditions was included in the assurances given by the State.

Sometimes tribunals use the ideal of an experienced businessperson as a standard for reasonableness in the context of legitimate expectations.[196] In other words, an investor's expectations cannot be reasonable if a diligent investor who had all the relevant information had foreseen that the legal framework was going to change. However, legitimate expectations are not synonymous with reasonable business decisions, as those decisions involve taking risks as well.[197] In any case, if the expectations of an investor were based on ill-informed facts or an overly optimistic judgment, they cannot be regarded as reasonable.[198]

1.2 Factors to Determine Whether Legitimate Expectations Were Violated

It is not enough for there to exist reasonable legitimate expectations that were relied upon by the investor. These expectations have to have been violated as well. Below, the impact of intention, disproportionate effects and retroactivity on establishing a violation are discussed. Once it has been established that a violation occurs, governments could still argue that this was caused by exceptional circumstances outside of its control. In this context, they can invoke the concept of *force majeure*, which is discussed below as well.

These concepts should not be seen as strict *criteria* that, once fulfilled, automatically lead to a non-violation of the investor's legitimate expectations. Rather, they are *factors* that can be

[196] *Thunderbird v. Mexico* (2006), Separate Opinion of Arbitrator Thomas Wälde at para 47; *Lemire v. Ukraine* (2006), ICSID Case No. ARB/06/18, Decision on Liability at para 285 and *Anderson v. Costa Rica* (2007), ICSID Case No. ARB(AF)/07/3 at para 58.
[197] Christoph Schreuer and Ursula Kriebaum, "At What Time Must Legitimate Expectations Exist?" in Jacques Werner and Arif Ali, eds, *A liber amicorum: Thomas Wälde* (London: Cameron May Publishing, 2009) at 265.
[198] Jorge Viñuales, "Investor Diligence in Investment Arbitration: Sources and Arguments" (2017) 32:2 ICSID Rev at 362 and *Invesmart v. Czech Republic* (2009) at para 250.

taken into account by Tribunals when balancing the investor's interest in regulatory stability with the State's prerogative to enact policy.[199]

1.2.1 Deliberate intention or bad faith

From the outset, it is useful to clarify that no deliberate intention or bad faith on the side of the host state is required for a breach of an investor's legitimate expectations.[200] In most cases, and it seems in all of the cases discussed in the previous Parts, the states enacted policy changes out of the genuine objective of protecting the public interest. They can nevertheless be held responsible for the effects of these changes when they frustrate the legitimate expectations of investors. In the rare case that a state is found to have acted in bad faith, this will be taken into account and aggravate the position of the host state.[201]

1.2.2 Disproportionate effects on the investment

Assessing whether the objective of the policy change is in balance with its impact on the investor's interests is an important factor in establishing a violation of an investor's legitimate expectations. Two elements can play a role in causing a disproportionate effect: the public interest at stake can be too small, or the impact on the investor can be too big. Both these elements can, single-handedly or taken together, lead a Tribunal to decide the policy change had a disproportionate effect on the investment.

As held by the Tribunal in *Blusun v. Italy*:

> "*In the absence of a specific commitment, the state has no obligation to grant subsidies such as feed-in tariffs, or to maintain them unchanged once granted. But if they are lawfully granted, and if it becomes necessary to modify them, this should be done <u>in a manner which is not disproportionate to the aim of the legislative amendment, and</u>*

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[199] Niclas Landmann, *Legitimate Expectations and Fair-and-Equitable-Treatment under the Energy Charter Treaty* (Baden-Baden: Nomos, 2022) at 102-103.
[200] See for example *CMS Gas Transmission Company v. Argentina* (2001), ICSID Case No. ARB/01/8 at para 280 and *Mondev International v. United States*, ICSID Case No. ARB(AF)/99/2 at para 116.
[201] *Waste Management v. Mexico II* (2000), ICSID Case No. ARB(AF)/00/3 at para. 138.

should have due regard to the reasonable reliance interests of recipients who may have committed substantial resources on the basis of the earlier regime."[202] (own emphasis)

In *Eurus Energy v. Spain*, the Tribunal looked at the factor of disproportionate effects through the lens of a reasonable return for the investor.[203] Since the Tribunal had not found any more specific promises made by the Spanish government in this case, it held that Eurus Energy could have only had the legitimate expectation of a reasonable return.[204] In turn, this led to the conclusion that amendments to the regulatory framework should be considered as proportionate as long as they allowed the investor to make a reasonable return on their initial investment.

After running through the complicated and technical process of determining what exactly would constitute a reasonable return, and what kind of return remained for investors after the legislative changes made by the Spanish government, the Tribunal came to the conclusion that the latter was still higher than the former.[205] In other words, Eurus Energy's rate of return after the legislation change was still higher than what they could have reasonably expected at the time they made their investment. Thus, the Tribunal concluded that the legislative amendments made by the Spanish government did not have a disproportionate effect.[206]

The three renewable energy cases included in Part II are each part of a broader wave of cases against the Czech Republic, Italy and Spain respectively. In *Legitimate Expectations and Fair-and-Equitable-Treatment under the Energy Charter Treaty*, Niclas Landmann provides a broader perspective and includes all the cases filed because of renewable energy framework changes in these three countries in their analysis.[207] Since all these cases have wildly varying outcomes, this approach shines a light on what exactly tribunals find essential in determining whether the legitimate expectations of investors were violated or not.

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[202] *Blusun v. Italy* (2014), ICSID Case No. ARB/14/3 at para 319(5).
[203] *Eurus Energy v. Spain* (2016), ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability at paras 356-369.
[204] *Ibid*., at para 356.
[205] *Ibid*., at para 368.
[206] *Ibid*., at para 369.
[207] Niclas Landmann, *Legitimate Expectations and Fair-and-Equitable-Treatment under the Energy Charter Treaty* (Baden-Baden: Nomos, 2022) at 179.

In general, the cases against Spain were the most successful (success rate of 79%), followed by the cases against Italy (success rate of 44%). To date, the Czech Republic has not lost a renewable energy case under Article 26 of the ECT.[208] So even though all these countries implemented changes to their investment frameworks surrounding the renewable energy sector, some were much more impacted by ISDS decisions than others. This could imply that tribunals hold the proportionality factor essential in determining whether an investor's legitimate expectations were frustrated. Comparing the Czech cases with the Spanish cases, tribunals found the policy changes in the latter much more drastic and radical, leading to a higher success rate for investors against the Spanish government.[209]

1.2.3 Retroactive Measures

The retroactive character of policy changes often affects the negative impact for the investor as well and is often used by tribunals to establish a disproportionate effect on the investment.[210] The Tribunal in *Eurus Energy v. Spain* for example held:

> *[…] To claw back those profits on the basis of a subsequent judgment that they were 'excessive' would seem inconsistent with the principle of stability in Article 10(1) of the ECT and has not been shown to have been necessary to resolve the tariff deficit problem. […] For these reasons, the Tribunal holds that, insofar as the claw-back operation is concerned, Spain breached Article 10(1) of the ECT.*[211]

The Tribunal thus established that the retroactive character of the Spanish policy change affected the obligation of regulatory stability under Article 10(1) of the ECT. The sovereign right to enact policy held by the Spanish government does not completely override this obligation. Put differently, the Tribunal found that Spain had the right to amend its policy framework, but not to the extent that past profits deemed 'excessive' were clawed back. This

[208] https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search
[209] Niclas Landmann, *Legitimate Expectations and Fair-and-Equitable-Treatment under the Energy Charter Treaty* (Baden-Baden: Nomos, 2022) at 180.
[210] "Recent Awards in Spanish Renewable Energy Cases" at 209-210.
[211] *Eurus Energy v. Spain* (2016), ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability at para 355.

logic is in line with the reasoning used by the Tribunal in *RREEF v. Spain*.[212]

1.2.4 Force Majeure

Also closely related to the proportionality of the policy change is the factor of *force majeure*. *Force majeure* is a concept referring to socioeconomic circumstances forcing a State to act in the interest of the public (and in this case neglecting the interest of the investor).[213] These circumstances must be exceptional and outside of the control of the State, causing very grave damage to the public. The burden to prove the existence of *force majeure* lies on the shoulders of the State and is very high. The Tribunal in *Greentech* for example held:

> "*The majority of the Tribunal does not deny that Italy faced "a situation of economic difficulty", as Professor Sacerdoti writes in his dissenting opinion. However, none of the circumstances evidenced in this case reach the level of force majeure. The right of Respondent to change the tariffs does not arise under the present circumstances, given that the justification for changes relate simply to alleged compensation to the service provider and the marginal cost to consumers.*"[214]

In essence, *force majeure* is a very extreme example of an absence of the disproportionate effects factor discussed above. Where the public interest is so important that it becomes impossible for a host state to ignore, even though enacting policy change will likely frustrate the legitimate expectations of an investor, this simply outweighs every other interest.

The first part of this Part has focused on the criteria that are used by tribunals to establish whether or not legitimate expectations were present, and on the factors that determine whether or not they were violated. Moving away from the investor's interests in regulatory stability, the next section zooms in on the government's right to enact policy changes.

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[212] *RREEF v. Spain* (2013), ICSID Case No. ARB/13/30 at para 325.
[213] Nathaliya Barysheva, "Force Majeure in Energy Arbitration: Predicting the Unpredictable" (2018) 2 Int'l Com Arb Rev 67.
[214] *Greentech v. Italy* (2015), SCC Arbitration No. 2015/095 at para 451.

2. A Changing World

The State's right to enact policy changes has featured heavily in investment cases regarding expropriation, but is also intimately connected to the concept of legitimate expectations since it often comes into conflict with the interests of investors in this regard. In *Tecmed v. Mexico* for example, the Tribunal held that a state cannot be held liable for economic injury caused by *bona fide* regulation, in line with the 'police powers' doctrine.[215]

Thus, tribunals always have to balance the fulfilment of the abovementioned criteria (the existence of specific promises, the reliance thereupon by the investor and the reasonableness of the investor's expectations) with the government's duty to act in the interests of the public in a changing world. As held by the Tribunal in *Saluka*:

> "*[N]o investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host state's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.*"[216]

Circumstances change all the time, and no one disputes that it is the State's prerogative to adapt policy in function of those changing circumstances. In a strictly legal sense, it does not matter what exactly brought a government to change its policy at a given moment in time. Whether it be because lobbyists from the renewable energy sector gained influence, the political composition of the government changed or new knowledge about greenhouse gas emissions came to light; tribunals do not explicitly take these reasons into account because it is not their place to assess the effectiveness of policy. However, these reasons are often incorporated into the facts section of the arbitral award, showing that Tribunals are at least aware of them. It would thus come as no surprise that these reasons play their role in determining the outcome of a case, either consciously or perhaps only subconsciously.

[215] *Tecmed v. Mexico* (2000), ICSID Case No. ARB (AF)/00/2 at para 119.
[216] *Saluka v. Czech Republic* (2001), Partial Award at para 305.

The cases that were discussed in Part II all had a climate change component to them. As mentioned earlier, the ECT was drafted at a time when climate change science was still in its infancy.[217] Not only was it not designed with the renewable energy sector in mind, it was also meant to function in a much more stable energy sector. In other words: the ECT, especially its provision around ISDS and its FET clause, was not meant to deal with the pivot towards sustainable energy alternatives that would ensue after it came into force. This raises the question whether Tribunals take into account this uncertainty on the side of the government when deciding on the alleged violation of an investor's legitimate expectations. And if not, whether they should, given the global climate emergency the world finds itself in today.

2.1 Example: *Rockhopper v. Italy*

The *Rockhopper v. Italy* case contains a whole section entitled 'The Rationale for the Change in Law in Late 2015' as part of the Tribunal's discussion of the facts. However, in the last paragraph of this section, the Tribunal seemed to diminish the value of the political process and reasoning behind the policy change that gave rise to the case:

> "*There were indeed political tensions in the background, and objectively speaking, such tensions as between central and regional authorities were undoubtedly present. There was an intention to hold a referendum (as noted in Fact No. 41), but the political grounds for this were resolved through parliamentary action at a central level (as noted in Fact No. 47). It can reasonably be seen that this parliamentary action headed off the likely referendum issues (again also noted in Fact No. 47). These are all the various manifestations of political discourse. <u>They are, in and of themselves, part and parcel of the normal political functioning of a country. It is a different matter as to whether or not sovereign measures taken as a result of such political processes engage international responsibility pursuant to specific promises embodied in applicable treaties</u>.*"[218] (emphasis added)

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[217] This does not mean, however, that it did not exist. Fossil fuel companies such has Shell have known about the effects of greenhouse gas emissions since the seventies, see Shell, *The Greenhouse Effect* (The Hague: Shell Internationale Petroleum Maatschappij, 1988) .
[218] *Rockhopper v. Italy* (2017), ICSID Case No. ARB/17/14 at para 114.

With this last sentence, the Tribunal seemed to acknowledge that States have the right to enact policy changes in the public interest, but that this can nevertheless lead to liability vis-à-vis investors. However, if it is implied that the reasons behind the policy change (in this case public outcry, including referendums, against the exploitation of oil fields) cannot have an impact on a liability charge by an investor based on the ECT, then why include it at all?

This section continues with an overview of how climate change considerations might interact with arguments in ISDS cases under the ECT. More specifically, one wonders whether tribunals could take into account that investors have known about climate change for decades when deciding on arguments pertaining to their legitimate expectations. On the other hand, the same can be said for governments however, who will often enact policies and make promises that are inconsistent with scientific knowledge on climate change.

2.2 Climate Science: A Brief History

Preliminary research work completed in 1954 by geochemist Harrison Brown and his colleagues at the California Institute of Technology showed that fossil fuels had caused atmospheric CO_2 concentrations to rise by about 5% over the past century.[219] Five years later, in 1959, Edward Teller warned the oil industry about the global warming effects this would cause:

> *Carbon dioxide has a strange property. It transmits visible light but it absorbs the infrared radiation which is emitted from the earth. Its presence in the atmosphere causes a greenhouse effect [...] It has been calculated that a temperature rise corresponding to a 10 per cent increase in carbon dioxide will be sufficient to melt the icecap and submerge New York. All the coastal cities would be covered, and since a considerable percentage of*

[219] Benjamin Franta, "Early oil industry knowledge of CO_2 and global warming" (2018) 8 Nature Climate Change at 1.

the human race lives in coastal regions, I think that this chemical contamination is more serious than most people tend to believe.[220]

It is perhaps unsurprising that the fossil fuel industry did not heed the warnings of a couple of 'overexcited' scientists. But if we move forward by about 15 years, the internal research teams of fossil fuel giants started accurately predicting the effects of fossil fuels on global warming. Internal documents from 1977 show how ExxonMobil scientists for example accurately forecast warming that is consistent with subsequent observations.[221] Another decade later, Shell drafted a confidential report entitled "The Greenhouse Effect":

"*Man-made carbon dioxide, released into and accumulated in the atmosphere, is believed to warm the earth through the so-called greenhouse effect. The gas acts like the transparent walls of a greenhouse and traps heat in the atmosphere that would normally be radiated back into space. Mainly due to fossil fuel burning and deforestation, the atmospheric CO2 concentration has increased some 15% in the present century to a level of about 340 ppm. If this trend continues, the concentration will be doubled by the third quarter of the next century.*

The most sophisticated geophysical computer models predict that such a doubling could increase the global mean temperature by l.3-3.3° C. The release of other (trace) gases, notably chlorofluorocarbons, methane, ozone and nitrous oxide, which have the same effect, may amplify the warming by predicted factors ranging from 1.5 to 3.5 ° C.

Mathematical models of the earth's climate indicate that if this warming occurs then it could create significant changes in sea level, ocean currents, precipitation patterns, regional temperature and weather. These changes could be larger than any that have occurred over the last 12,000 years. Such relatively fast and dramatic changes would

[220] Benjamin Franta, "On its 100th birthday in 1959, Edward Teller warned the oil industry about global warming", 1 January 2018, *The Guardian*.
[221] Geoffrey Supran and Stefan Rahmstorf, "Assessing ExxonMobil's Global Warming Projections" (2023) 379 Science 1.

impact on the human environment, future living standards and food supplies, and could have major social, economic and political consequences."[222]

It is clear from these sources that humanity in general, and fossil fuel companies in particular, have known about global warming for at least 50 years, if not more than that. This means that ignorance cannot be an argument. In the context of this Part on legitimate expectations, this is important because legitimate expectations are formed against the backdrop of *'all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State'*.[223] Climate change and its effects are without a doubt part of these circumstances.

2.3 Should Companies Have Seen This Coming?

The question then becomes to what extent climate change considerations can or should inform investors' legitimate expectations. An excellent example to illustrate how the concept of legitimate expectations can come into conflict with the long-established knowledge about climate change is the *RWE v. The Netherlands* case.

As discussed above in Part II, *RWE* invested in a coal-fired power plant in The Netherlands with the reassurance that the successive Dutch governments all backed the plans. Thus, the construction was finally completed in 2015 and the plant began producing electricity. But after the elections of 2017, the newly elected Dutch government decided to change course and prohibit the generation of electricity based on coal. Arguing, *inter alia*, that its legitimate expectations had been frustrated, RWE lodged a case against The Netherlands based on the ISDS provision in the ECT.[224]

In this case, it seems that the core of the issue is situated at the conflict between assurances made at a specific moment in time, and the larger, evolving societal currents in a State. In other words, how long could RWE have legitimately expected the assurances by the Dutch

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[222] Shell, *The Greenhouse Effect* (The Hague: Shell International Petroleum Maatschappij, 1988).
[223] *Duke Energy v. Ecuador* (2004), ICSID Case No. ARB/04/19 at para 340.
[224] See Chapter III, Case III.

government to last? The long-established knowledge about climate change described above, the EU-wide CO_2 reduction targets in effect since 1992 and the numerous reports commissioned by the Dutch government highlighting the need to reduce the amount of CO_2 emissions by fossil fuel-fired electricity production to net zero should all be taken into account.[225] Taking all these factors together, it seems hard to argue that the assurances made by different Dutch governments to achieve the short-term goal of reducing electricity costs can completely overrule the omnipresent societal emergency that is climate change. So could RWE have legitimately and reasonably expected Dutch policy on coal-fired power plants to remain constant for the life expectancy of their project, i.e. 40 years?

For a project costing over 3 billion euros, one would expect an investor not to embark on such an adventure lightly. It is frankly hard to understand how a coal-fired power plant, albeit one that is allegedly among the 'cleanest in the world', fits into RWE's global policy objective to become completely carbon neutral by 2040. So if RWE undoubtedly knew about the need to reduce CO_2 emissions, globally but also in The Netherlands specifically, to the point that it had incorporated this objective as one of its own policy goals, on what basis did it decide to invest in a coal-fired power plant anyway? Did RWE make this investment because it knew that it could rely on the ECT to demand compensation when the policy framework changed?

There has not yet been a case where a tribunal explicitly deals with the impact of climate change science on the responsibilities of an investor. However, tribunals have previously acknowledged that investors have a due diligence responsibility to be aware of the political, societal or economic circumstances surrounding their investment.[226] In *Plama v. Bulgaria* for example, the Tribunal held that a diligent investor has to be aware of the parliamentary debates relating to potential changes of the relevant environmental law.[227] In *Unglaube v. Costa Rica*, the Tribunal concluded:

[225] *RWE v. The Netherlands* (2021), Respondent's Counter-Memorial at para 92.
[226] Jorge Viñuales, "Investor Diligence in Investment Arbitration: Sources and Arguments" (2017) 32:2 ICSID Rev at 362.
[227] *Plama Consortium v. Bulgaria* (2003), ICSID Case No. ARB/03/24 paras 219-221.

As intelligent and experienced investors, Claimants were, of course, required, as part of their due diligence, to become familiar with Costa Rican law and procedure. The Tribunal understands that the workings of the courts and administrative agencies of Costa Rica surely involve noticeable differences from those with which Claimants may be more familiar.[228]

Tribunals will thus take the experience level of the investors into account when determining the due diligence obligations they have. The fact that they are dealing with a judicial system they are perhaps less familiar with than the one in their home country is also taken into account, but cannot mean that investors should not make sure they understand the circumstances surrounding their investment.[229]

2.4 Should Governments Have Seen This Coming?

Companies, or investors in the context of the ECT, are not the only ones to blame however. As highlighted multiple times throughout the different Parts, interpreting and applying Article 10 of the ECT is about providing enough stability to make long-term investments attractive, while giving States enough room to enact policy and protect the public interest. Thus, the way in which governments act towards (possible) investors matters a great deal. One cannot make explicit, specific promises vis-à-vis an investor one day, and then break those promises the next. It is only fair to expect governments to make decisions with the same due diligence we expect from investors when they partake in multi-billion euro investments.[230]

Thus, the abovementioned long-established knowledge of global warming speaks just as much against the Dutch government as it does against RWE. It too knew about the devastating effects CO_2 emissions would have on every aspect of life on this planet.[231] But just like most other (first-world) States, the reaction of the Dutch government consisted largely of

[228] *Unglaube v. Costa Rica* (2009), ICSID Case No. ARB/09/20 at para 258.
[229] See further *Chemtura v. Canada* (2010), at para 149; *Occidental Petroleum Corporation v Ecuador* (2006), ICSID Case No. ARB/06/11, at para 383; *Copper Mesa Mining Corporation v. Ecuador* (2012), PCA No. 2012-2 at paras 6.60-6.71 and *Charanne v. Spain* (2012) SCC No. 062/2012 at para 507.
[230] Hector Mairal, "Legitimate Expectations and Informal Administrative Representations" (2010) Int'l Investment L and Comparative Public L at 442.
[231] Intergovernmental Panel on Climate Change, *Climate Change 2023 Synthesis Report* (Geneva: IPCC, 2023).

inaction.[232] It is against this backdrop that all the Dutch governments from the 2000s to 2017 were indeed quite eager to attract investments into the coal-fired power plant sector. Instead of doing what was needed to protect the public interests in the long run, the Dutch government did what was needed to get them re-elected for the next term: reducing short-term electricity costs by allowing the generation of cheap power based on coal.

However, is it fair to then hold the new 2017 government accountable when they decide to change course (in this case arguably with good reason, i.e. combatting climate change)? If the notion of legitimate expectations is interpreted in such a way that it prevents subsequent governments from introducing substantive policy changes, it starts to hollow out our democratic system. Of course, even an all-important policy objective such as climate change cannot be used as a *carte blanche* for governments to act in whichever way they want.[233] Again, it is clear that some sort of balance needs to be found between the interests of both the investors and the general public.[234]

So when we look at the *RWE v. The Netherlands* case from the point of view of serving justice, who should be held responsible for covering the losses in this case? RWE invested billions in the project and is trying to recover 1.4 billion euros from The Netherlands through the lodged ISDS case. Is it only right to hold RWE accountable for their losses, as they knew about the extent of the climate crisis and should have foreseen the Dutch government would (be forced to) take action at some point? Or should the Dutch government bear the costs as assuring investors one thing on day one, and then doing another thing on day two will likely make long-term investments impossible? If that is the result however, it is only a fiction that the people responsible for this behaviour would actually get punished.[235] In the end, it is the taxpayer who will be paying for it.

[232] *Urgenda v. The Netherlands,* Dutch Supreme Court (2019) Case No. 19/00135.
[233] *Infrastructure Limited v. Spain* (2013), ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum at para. 468.
[234] David Gaukrodger, "The Balance Between Investor Protection and the Right to Regulate in Investment Treaties" (2018) OECD Working Paper on International Investment No. 2017/02 at 18.
[235] Given the very long time it takes for tribunals to reach a decision in cases like these, the main actors can never be held politically responsible either. The Dutch prime minister Mark Rutte had been in office for 13 years before resigning in 2023, thus holding the final political responsibility for most of the *RWE* case.

2.5 The Sovereign Right to Enact Policy

RWE itself agrees that the question who should bear the costs after a policy change is essential in solving an ISDS case based on the legitimate expectations argument:

> *This dispute is not about the existence of climate change and its consequences nor about contesting the need to reduce CO2 emissions. It is about the very basic question who should bear the financial consequence after a fundamental change of policy:*
>
> *– the State, who claims to act for the public benefit and achieves CO2 reduction at no cost, or*
> *– the investor, who has relied on promises, policy statements, and permits when deciding to invest billions in one of the most modern coal fired power plants in Europe, if not on the planet?*
>
> <u>*This is not a political, but a purely legal issue.*</u> *Claimants do not ask this Tribunal to create law, but merely to apply it. If a State unexpectedly forces an investor to sacrifice its lawful investment for the public benefit, then the State has to pay compensation. This is a tenet not only of the Energy Charter Treaty (the "ECT"), but of investment protection in general. And Respondent has not complied with that principle.*[236] (own emphasis)

By explicitly mentioning that the issue at hand is 'not political, but purely legal', RWE tries to lay the focus on the State's legal responsibilities, rather than the political processes that lie at the basis of the policy change. According to RWE, it is not their responsibility to take into account the effects of a climate emergency. If a government decides coal-fired power plants are (still) a good idea, then they should bear the consequences when they change their mind.

It is not surprising that RWE is conscious of the possible effects of drifting toward a discussion of the legitimacy, correctness or appropriateness of a political decision. Tribunals are also very

[236] *RWE v. The Netherlands* (2021), Request for Arbitration at 3-4.

weary of overstepping their competence, as exemplified by this statement from the *Rockhopper v. Italy* case:

> "*The Ombrina Mare oil and gas field did not proceed to production, and as is clear from the record of this case and the discussion later on in this Award, this came about because Italy decided to pass a law in late 2015 which banned offshore production within a certain distance of Italian shores. That was a sovereign decision made by Italy and the Tribunal indicates at the very outset that <u>it should not be taken in any way to either criticize or deprecate that decision from either a political or environmental standpoint. Italy's sovereign choice to proscribe such offshore production, based on its own inherent authority and dignity, was its to make. However, that sovereign choice or act or decision (the label is not important) of Italy may carry with it a concomitant consequence to pay certain compensation pursuant to internationally-binding promises it made to foreign investors arising from its being a party to the ECT at the material time</u>*.
>
> […]
>
> *The Tribunal appreciates and is acutely sensitive to the fact that there are strongly-held environmental, civic and political views about offshore production in Ombrina Mare. However, the outcome of this case passes no judgment whatsoever on the legitimacy or validity of those views. <u>In particular, the Tribunal is at pains to point out that this award is not a "victory" for one side or the other in that environmental debate, which is of a civic or political character,</u> but rather addresses the legal issue at hand, namely, whether compensation is due to a foreign investor in respect of its investment, based on specific international criteria as contained in a treaty to which Italy was, at the material time, a contracting party*."[237] (own emphasis)

Aside from the point that it will be the taxpayer who ends up paying for the damages in the end, the Tribunal seems to take a few shortcuts here to conclude that the case is strictly about

[237] *Ibid*., Award at paras 3-4 and 10.

legal obligations leading to legal consequences. Even though the Tribunal emphasizes that 'Italy's sovereign choice to proscribe such offshore production, based on its own inherent authority and dignity, was its to make', the consequences of the case at hand will inevitably affect that 'inherent authority'. Indeed, it is not the Tribunal's place to assess whether Italy's policy change was the right thing to do in those circumstances.[238] Nor does the Tribunal have the competence to declare that policy change invalid, or to amend it in favour of the investor.

But penalizing the Italian government through the payment of damages (184 million euros in this case) does impact Italy's sovereign right to enact policy in the public interest. For one this means that the Italian government sees its budget, and thus its power, reduced. But more importantly, cases where a polluter is paid millions of euros in damages for a project to which the Italian public was strongly opposed in the first place often receive a lot of attention in the media.[239] This in turn affects the chances of re-election for the sitting government, which means they will be much less likely to enact similar policies in the future.[240] An example of this regulatory chill is the *Ethyl v. Canada* case where Canada repealed its newly implemented ban on a fuel additive after a lost ISDS case, despite a genuine environmental concern regarding the effects of the additive.[241]

[238] States enjoy a wide margin of discretion thanks to their sovereign right to enact policy, see Lone Mouyal, *International Investment Law and the Right to Regulate* (Oxon: Routledge, 2016) at 32.
[239] Climate Action Network, "Outrage as Italy Ordered to Pay Out Millions to Oil Investor over Energy Charter Treaty Claim", 24 August 2022, *CAN Europe*; Arthur Nelsen, "Oil Firm Rockhopper Wins £210m Payout After Being Banned From Drilling", 24 August 2022, *The Guardian* and Charlotte Elton, "No Climate Justice: Oil Firm Rockhopper Wins €241m Payout After Being Banned From Drilling", 09 September 202, *Euronews*,.
[240] Bradly Condon, "Climate Change and International Investment Agreements" (2015) 14:2 Chinese J Int'l L 305.
[241] *Ethyl Corporation v. Canada* (1998).

IV. Environmental versus Financial Policy Objectives

The previous Part has argued that climate change considerations *should* inform tribunals in the application and interpretation of the legitimate expectations concept. The next question is: *do* they?

As indicated in Part I, fossil fuel cases are not the only type of cases that can be linked to climate change. The renewable energy cases discussed in Part II also have a link to climate change, but can be seen as mirrors to the fossil fuel cases in some ways. In the fossil fuel cases, the governments were looking to protect the environment against polluting energy activities. In the renewable energy cases however, the investors are supporting environmental objectives by investing in the green energy sector.

The governments in those latter cases were not actively looking to undermine their domestic climate policies. As mentioned earlier, the renewable energy cases were brought after the financial crisis of 2008, with some EU member states looking to improve their financial stability by reducing the renewable energy incentive frameworks. This has nevertheless had an important effect on the development of the renewable energy sector.[242] The more cuts in renewable energy incentive programs are made every time a crisis hits, the less willing investors will be to make long-term commitments in the sector.[243] Especially for newly developed technologies, State support is the most important factor in determining the feasibility of a project.[244] The Energy Charter Secretariat considers carbon capture and storage as part of the energy cycle for example, thus bringing this technology within the scope of application of the ECT.[245]

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[242] Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Energy 2020: A Strategy for Competitive, Sustainable and Secure Energy, COM (2010) 639 Final at 9.
[243] Anatole Boute, "Combating Climate Change through Investment Arbitration" (2012) 35:3 Fordham Int'l LJ at 624 and Valentina Vadi, "Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?" (2015) 48 VJTL at 1350.
[244] European Commission, Directorate-General for Energy And Transport, Intelligent Energy For Europe Programme, Assessment And Optimization Of Renewable Energies Support Schemes In The European Electricity Market, Final Report 19-21 (2007) at 177-178 and David Hall, Steve Thomas, Sandra van Niekerk and Jenny Nguyen "Renewable energy depends on the public not private sector" (2013) The University of Greenwich, Public Services International Research Unit at 2.
[245] Energy Charter Secretariat, "Investment And Market Development In Carbon Capture And Storage: Role Of The Energy Charter Treaty" (2009).

Thus, from a public interest perspective, deciding in favour of the investor in the fossil fuel cases discussed in Part II could hurt the fight against climate change. On the other hand, deciding in favour of investors in renewable energy cases could have a positive impact on combatting climate change, but a negative one on short-term energy prices.[246] Given these different public benefits at stake, it might be interesting to bring the two perspectives together, and analyze whether the policy objective behind a regulatory change can make a difference in the context of establishing a violation of an investor's legitimate expectations under Article 10 of the ECT.

To do this, this Part will proceed with a quantitative analysis of ISDS cases under the ECT that feature arguments about the legitimate expectations of an investor. Studying different variables such as the amounts of damages awarded and claimed in combination with the presence or absence of legitimate expectations, will allow us to contrast fossil fuel cases with renewable energy cases in a broader way. Afterwards, it will become possible to determine whether the data on existing ISDS cases supports the hypothesis that tribunals decide differently in function of the policy objective that is connected to the case before them.

1. Statistics on Fossil Fuel versus Renewable Energy Cases under the ECT

To date, 158 arbitration cases have been brought to an international tribunal under the ISDS provision of the ECT. Of these cases, 54 were initiated by fossil fuel investors and 82 by renewable energy investors.[247] According to the ECT Secretariat statistics, investors asked for approximately 100 billion euros in damages in the fossil fuel cases. Tribunals awarded approximately 41 billion euros in the end. For renewable energy cases on the other hand, 23 billion euros were demanded by investors and 1.25 billion ended up being awarded by the tribunals.[248]

[246] Luke Elborough, "International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change" (2017) 21 NZ J Envtl L at 112-114.
[247] Nuclear energy is excluded from these statistics, as it is contested whether this is a fossil fuel or a renewable energy source. To date, 5 nuclear energy cases have been brought based on the ECT's ISDS provision.
[248] www.energychartertreaty.org/cases/statistics/

Since this research project was mainly focused on the ECT's fair and equitable treatment standard (and its legitimate expectations component), it is useful to exclude cases that were initiated and awarded on other grounds from these statistics. Doing so will allow for a better comparison in the context of the possible influence of the policy objective factor.

1.1 Methodology

From the initial dataset of 158 arbitration cases under the ECT, 92 remain when filtering for cases where the FET standard was used as an argument by the claimants. However, not all these cases are usable in the context of comparing fossil fuel cases with renewable energy cases. First, four of these cases were initiated by investors in the nuclear energy sector. On top of that, it was not possible to put seven other cases in either the fossil fuel, renewable energy or nuclear energy categories (because they involved investments in electricity infrastructure for example). These ten cases were excluded. Second, some cases do not have a final award (yet), because they have been discontinued, settled or are still pending before a tribunal. Altogether, 17 cases without a final award were removed. Thus, we are left with 65 fossil fuel or renewable energy cases where the investor invoked a breach of the FET standard to support their claims.

Basing our analysis on this dataset would still yield distorted conclusions however. This has four reasons. First, the data of the fossil fuel cases would be very heavily influenced by one particular case (or rather: four cases that are all concerned with the same facts). These cases revolve around the bankruptcy of the Russian-incorporated Yukos Oil Company.[249] In all four cases, Russia was found to have violated Article 13(1) of the ECT, and thus to have unlawfully expropriated Yukos Oil by imposing exorbitant tax rates on the company, and harassing, intimidating and arresting its employees.[250] Because these actions eventually led to the bankruptcy of Russia's largest oil company, the amounts of damages claimed and awarded (95

[249] These cases are *Hulley Enterprises v. Russia* (2005), PCA Case No. 2005-03; *Yukos Universal v. Russia* (2005), PCA Case No. 2005-04; *Veteran Petroleum v. Russia* (2005), PCA Case No. 2005-05 and *Yukos Capital v. Russia* (2013), PCA Case No. 2013-31.

[250] The Tribunals agreed with the claimants in these cases that this was a deliberate attempt from Russia to favour Yukos' competitor Rosneft, Russia's largest state-owned oil company. This objective was achieved in the end, because Rosneft was able to require the majority of Yukos' assets cost-free. See *Hulley Enterprises v. Russia* (2005), PCA Case No. 2005-03 at para 1581.

billion and 34 billion euros respectively) completely outweigh the combined amounts of damages claimed in the other fossil fuel cases. For this reason, and because Russia no longer applies the ECT anyway, these four cases were excluded from the dataset.

Second, the results of the data on the renewable energy side would also be influenced by one particular instance. This is because four cases against the Czech Republic were brought by different investors, but the facts, arguments, final decisions and even the tribunal composition and the date of the final award are all identical. Because of this, these four cases are treated as one case in the analysis that follows below.[251] Third, five cases ended up not being assessed on their merits because the Tribunals held that they were outside their jurisdiction. Since this meant that the invoked FET arguments were not analyzed, these five cases were excluded as well.[252] Finally, four cases were removed because the awards were not made public by the parties, and could thus not be analyzed in the context of the FET standard or a legitimate expectations argument.

This leaves 49 cases, of which 15 are fossil fuel cases and 34 are renewable energy cases, that can be analyzed in function of the policy objectives from the state that lies at the basis of the investors' claims.

1.2 Results

Even though renewable energy cases make up over two-thirds of the analyzed cases, the amount of damages claimed in fossil fuel cases is only slightly smaller than in renewable energy cases (5,2 billion versus 6.2 billion euros respectively). This is due to the often smaller scale of renewable energy projects, which are inherently more modular than oil or gas projects that require extraction infrastructure.

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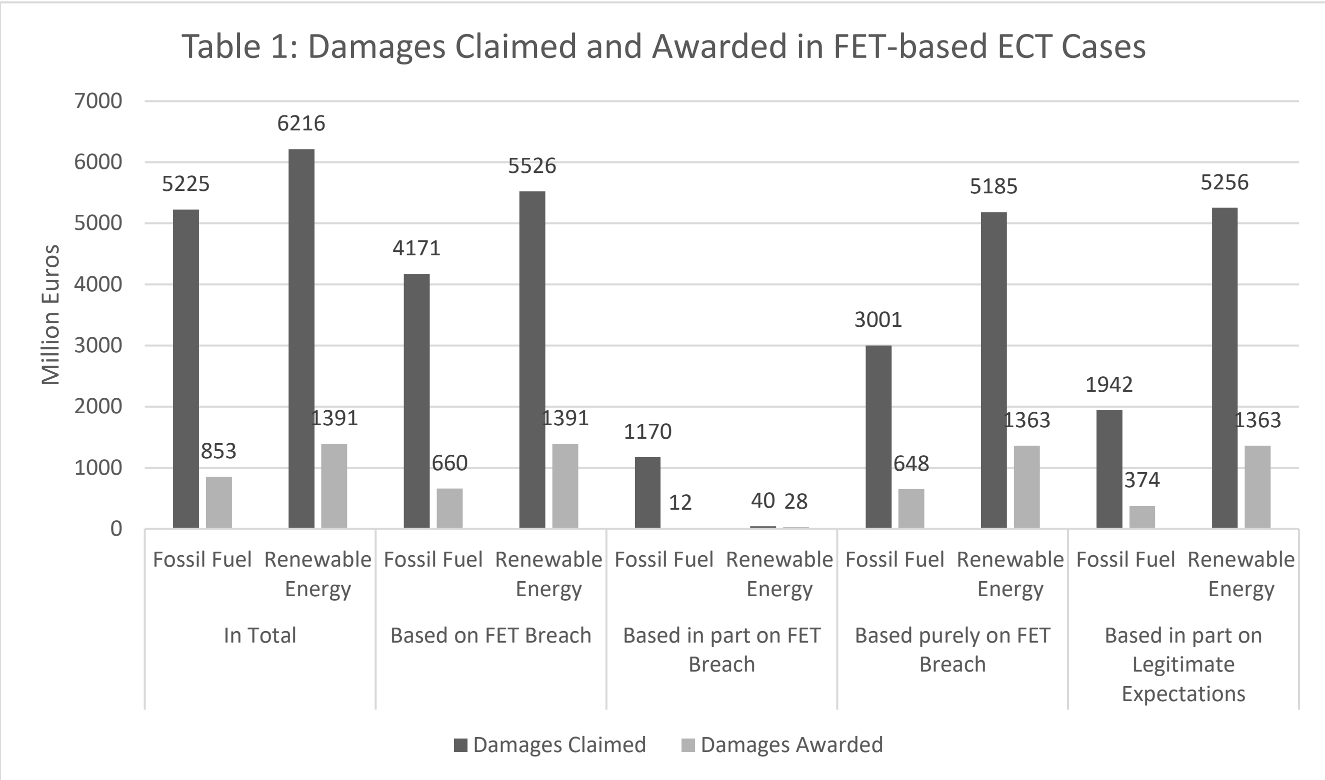
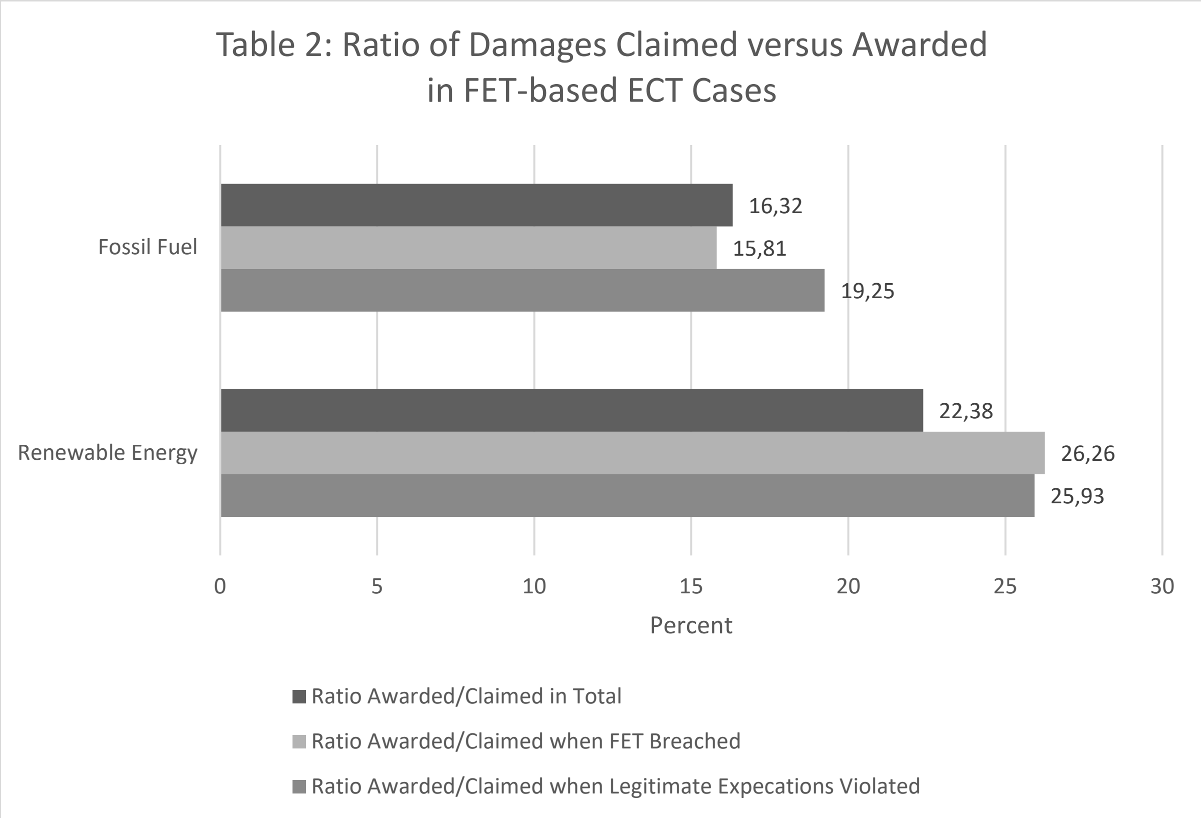
[251] The amounts claimed by the investors were added up since the four cases were brought by different investors, claiming different damages. The amount of damages awarded was not affected because the Tribunals rejected all four cases on their merits. See *Europa Nova v. Czech Republic* (2013), PCA Case No. 2014-19; *Voltaic Network v. Czech Republic* (2013), PCA Case No. 2014-20; *Photovoltaik Knopf v. Czech Republic* (2013), PCA Case No. 2014-21 and *I.C.W. v. Czech Republic* (2013), PCA Case No. 2014-22.

[252] Cases where the FET arguments were not analysed because the tribunal found a violation of another article of the ECT (most commonly article 13) were however included.

More interesting is the disproportionate decrease in cases (and thus also in claimed damages) featuring awards based on FET breaches. Less than half of the analyzed fossil fuel awards find such a breach (from 15 to 7), whereas almost two-thirds of the renewable energy awards revolve at least partially around the FET standard. This trend continues when we look at the cases that involve awards accepting legitimate expectations arguments. Only two tribunals in the fossil fuel cases (partially) base their awards on a breach of the investor's legitimate expectations, whereas 23 out of the 34 renewable energy tribunals confirm a violation of legitimate expectations.



Moving on to the amounts of damages claimed and awarded in FET-based fossil fuel and renewable energy cases, comparing the ratio between the two yields some interesting results. From the outset, it is clear that investors in renewable energy cases obtain consistently higher percentages than investors in fossil fuel cases (Table 2). In total, investors in the renewable energy sector receive over 6% more on the total amount of damages they initially claimed (22% in renewable energy cases versus 16% in fossil fuel cases). Looking at cases where the tribunal found the FET standard had been breached, this gap widens even more: renewable energy investors receive over 10% more of their claims in those cases (26% in renewable energy cases versus 16% in fossil fuel cases). Singling out the cases where the legitimate expectations of the investor were violated, the gap becomes a bit smaller but remains noticeable at almost 7% (26% in renewable energy cases versus 19% in fossil fuel cases).



Looking further into the concept of legitimate expectations in particular, it also becomes clear that investors in renewable energy cases are much more successful in convincing tribunals that their expectations were frustrated. In cases where the tribunal analyzed the legitimate expectations argument on its merits, fossil fuel investors were only successful half of the time (50%), while renewable energy investors were able to convince the court in over two-thirds of the cases (69%). Strikingly, the legitimate expectations argument was present in every single one of the renewable energy cases, whereas it only featured in just over half of the fossil fuel cases. The fact that the concept of legitimate expectations has only recently gained traction in international investment cases could play a role here since the renewable energy cases are on average more recent than the fossil fuel cases.

1.3 Analysis

Comparing the economics of fossil fuel and renewable energy FET cases under the ECT seems to lead to the conclusion that the latter category has now become more important than the former. Both in general and in cases with an award based on the FET standard, renewable energy cases make up the bigger share of damages claimed and received. Looking at legitimate expectations specifically, renewable energy cases are responsible for over double the amount of damages claimed, and over three times the amount of damages awarded. This means that the concept of legitimate expectations in the context of the ECT is now more important for protecting the interests of renewable energy investors than it is for protecting the interests of fossil fuel investors. Given the fact that renewable energy cases have outweighed fossil fuel cases by about three to one in the last decade, this is unlikely to change in the near future.

This conclusion is confirmed by the data on the number of cases featuring legitimate expectations. Only two out of fifteen fossil fuel cases have awards (partially) based on the concept of legitimate expectations, whereas for renewable energy cases that number is twenty-three out of thirty-four. Perhaps the most important statistic however is concerned with the ratio between claimed damages and awarded damages. Again, renewable investors are better able to protect their interests in legitimate expectations cases at 26% of their claims awarded, whereas fossil fuel investors only receive 19%.

So does this mean that the academic and popular backlash against the ECT in particular, and ISDS in general in a climate context is unwarranted? Not necessarily. To my knowledge, academic research around this topic rarely engages in statistical analysis of ISDS awards under the ECT (in fact, I have not found a single academic article providing an in-depth overview of the available data). Rather, critics of ISDS engage in a conceptual analysis and apply the different ways of legal recourse foreign investors have in the context of the ECT to the current context of a climate crisis. This often leads to the conclusion that the ISDS clause in the ECT can be used to obtain high amounts of damages whenever foreign investors are impacted by climate regulation. This in turn could lead to a chilling effect, where governments are no longer willing to enact climate policies due to the possible arbitral cases this will cause. These conclusions are primarily based on one of two things: a highlight of a particular case that has a negative impact on climate change or an abstract conceptual analysis of the way ISDS mechanisms could have a negative impact on climate change.[253]

With regard to particular climate-related cases that can be used to criticize the ECT's ISDS provision in particular, the conclusion is that it is hard to find any. The three fossil fuel cases that were analyzed in detail earlier in Part II are the ones that are most often used as examples by authors to show the negative impact of the ECT's ISDS provision on climate change.[254]

However, *Vattenfall v. Germany* never made it before a tribunal, since a settlement was reached beforehand. One could argue that this settlement allowed for the construction of a polluting coal power plant, and that this perhaps would not have been the outcome if ISDS had not been an option. But at the same time, a tribunal might have decided against a breach of the ECT's ISDS provision, thus preventing the construction of the power plant.

Rockhopper v. Italy on the other hand was decided in favour of the investor, awarding damages because the Italian government refused to allow exploitation of the Ombrina Mare oil field. In this case, the government did however provide a positive environmental impact assessment to the investor. If this had not been the case, it seems unlikely that the decision of the tribunal would have been the same since it attached much weight to this assessment.

RWE v. The Netherlands is perhaps the most striking climate-related fossil fuel case to date. In this case, climate considerations feature heavily with arguments revolving around climate policies on both sides. Since RWE decided to withdraw its case based on the jurisdictional issues that surrounded it, it will never be known how a tribunal would have judged the substantive arguments it put forward. Since the case has now been withdrawn, the conclusion

[253] For the first category see for example Claire MacLachlan, "Improving Environmental Protection in Investor-State Dispute Settlement" (2020) 46:1 Colum J Envtl L 179 at 187-189. For the second see for example Marina Kofman, "Investor-State Dispute Settlement Challenges and Reforms" [2018] 25 Austl Int'l LJ 49. Often both are combined, for example in Jenny Harbine, "NAFTA Chapter 11 Arbitration: Deciding the Price of Free Trade" (2002) 29 Ecology L Quarterly 371.
[254] Kyla Tienhaara et al., "Investor-State Dispute Settlement: Obstructing a Just Energy Transition" (2022) Climate Policy and Perrine Mouterde, "France Withdraws from Controversial Energy Charter Treaty to Meet Climate Goals", 22 October 2022, *Le Monde*.

at this point has to be that ISDS cases under the ECT with a negative impact on climate change are few and far between.

Nevertheless, the more abstract argument that the ECT's ISDS mechanism *could* have a negative impact on climate change could still hold true. An ISDS mechanism, especially in an energy-focused treaty such as the ECT, is inherently meant to protect the interests of the investors. And as long as fossil fuels are around, investors in that sector could feasibly employ the ECT's ISDS mechanism to fight the government's climate policy measures and protect their investments. However, a first look at the data provided above seems to show that the impact on climate change of these fossil fuel cases should, as of yet, not be overstated. As mentioned above, all the analyzed factors point to a relatively low success rate for fossil fuel investors when it comes to the FET standard in general, and the legitimate expectations argument in particular. But as governments ramp up their efforts to enact more effective climate change policies, this will of course impact fossil fuel investors. In the long term, we might very well see the importance of fossil fuel cases grow, which could lead to tribunals awarding more damages.

2. Are Tribunals More Susceptible to Financial Objectives than Climate Objectives?

The analysis of the legitimate expectations concept in Part III reveals that tribunals have a margin of interpretation when applying the FET standard in the ECT to a given set of facts. Concerning legitimate expectations specifically, tribunals disagree on an important point: whether general commitments (including the incentive framework itself) can establish legitimate expectations.[255] Additionally, it is inherent to the different factors that are involved in establishing a breach of the legitimate expectations concept that different tribunals will judge the same set of facts differently. Factors such as reasonableness or disproportionality for example will always include a certain margin of appreciation.

This means that, at least in theory, tribunals can use the government's policy objective, consciously or subconsciously, as a deciding factor in determining whether an investor's

[255] Rahmi Kopar, *Stability and Legitimate Expectations in International Energy Investments* (Oxford: Hart Publishing, 2021) at 121.

legitimate expectations have been breached. The question is: does the data provided above support this hypothesis?

The analysis of the dataset regarding the FET standard in ECT cases shows that the success rate of legitimate expectation claims is lower in fossil fuel cases. Fossil fuel investors were less successful in getting tribunals to award damages based on such arguments, both in absolute numbers and proportionally. When a breach of the investor's legitimate expectations was found, tribunals awarded a smaller share of the original claim to fossil fuel investors than to renewable energy investors.

This could be due to tribunals giving less weight to the investor's interest in regulatory stability than the government's ability to enact environmental policy in fossil fuel cases. The fact that fossil fuel investors are less successful in cases with legitimate expectations arguments could be influenced by lots of factors, and is not necessarily caused by tribunals being susceptible to the argument that governments should have the regulatory freedom to enact effective climate policies.[256] The data is consistent with the hypothesis that tribunals do not attach enough weight to stability arguments to swing the balance in favour of investors, at least when compared to renewable energy investors.

But what with the second half of the question? Does the higher success rate of renewable energy investors when it comes to legitimate expectations cases show that tribunals are more sensitive to climate objectives? Similar to fossil fuel cases, this is not necessarily true. Lots of other factors play a role in the decision-making process of a tribunal, and in determining the amount of the damages awarded. However, the data do not rule out that climate change objectives could play their part. Given the emphasis tribunals put on balancing regulatory stability with the sovereign's prerogative to enact (climate change) legislation, the importance of combatting global warming could play a role. Since tribunals seem more reluctant to award damages in fossil fuel cases when compared to renewable energy cases, climate considerations are probably not completely without impact.

[256] The different nature of fossil fuel investments (compared to renewable energy investments) for example could have an impact. Because of these differences, fossil fuel investors seem to rely more on unlawful expropriation arguments. As highlighted above, the fossil fuel cases are, on average, older than the renewable energy cases which could play a role. As always, simple chance is also a factor.

CONCLUSION

One has to be careful not to target the wrong problems in complex issues such as investments and their impacts on climate change policy. Rather than focusing on getting rid of the ISDS clause of the ECT, EU Member States should do everything they can to reduce their dependence on the fossil fuel industry. If there is no longer a need to attract more fossil fuel investments, then the ISDS provision of the ECT cannot give rise to any new fossil fuel arbitration cases. Withdrawing might indeed take away the risk of facing new cases once climate policies throughout the EU are ramped up, on the condition that an intra-EU agreement is made to ignore the ECT's sunset clause. But withdrawing also means investors could lose the assurance of regulatory stability they require for investment in new renewable energy technologies.[257]

As highlighted above, successful fossil fuel cases based on FET arguments under the ECT's ISDS provision are few and far between. Critics of the ECT's ISDS in this context often refer to the exorbitant claims, but can only highlight a very limited number of cases where the investor was successful. *Rockhopper v. Italy* is the most notable of those cases, but its success was largely attributable to the Italian government itself because it awarded Rockhopper with a positive impact assessment review.[258] Other examples that are often cited by critics include *Vattenfall v. Germany*, which never made it to a tribunal because it was settled; *RWE v. The Netherlands*, which was withdrawn; and *Uniper v. The Netherlands*, which has now been withdrawn as well.[259]

This contribution has indicated that the ECT seems to be more advantageous to renewable energy investors than it is to fossil fuel investors, at least when it comes to legitimate expectations and the FET standard. Article 10(1) of the ECT prohibits states from coming back on previously made promises and ensures that investors can rely on stable incentive frameworks that are necessary for long-term investments in new renewable energy technologies. Without it, the EU risks losing out on part of these investments due to

[257] Assuming ISDS provisions do in fact incentivise investments in developed countries, which is contested. This question falls outside the scope of the present research analysis however. See for example Josef Brada, Zdenek Drabek and Ichiro Iwasaki, "Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis" (2021) 35:1 J of Economic Surveys 34.
[258] See Chapter II, Case II.
[259] Bart-Jaap Verbeek, "The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?" (2023) 8 Business and Human R J at 99.

uncertainty with regard to changing governments that might withdraw previously enacted incentive programs.

Even though the impacts of the ECT on renewable energy investments have become more important in recent years, it will be the way in which the Treaty interacts with fossil fuel investors that will determine its future. The possibility for fossil fuel investors to challenge climate regulation when this frustrates their legitimate expectations features in most critical academic work on the subject.[260] Even states have explicitly referred to ISDS as a reason for their intention to withdraw from the ECT.[261]

Moreover, states such as Denmark and New Zealand have publicly admitted they experienced a chilling effect due to possible investor-state dispute settlement claims.[262] Hence, the claim made by some authors that the ECT's ISDS provision has a negative impact on climate policy due to a chilling effect seems to have materialized.[263] But the question remains whether the ECT in general, and the legitimate expectations arguments found in its ISDS cases in particular, should actually give rise to a fear of getting sued for enacting climate policy. Given the first quantitative analysis of the ECT's FET and legitimate expectations cases, there does not seem to be a lot of grounds for these fears in the existing case law.

It has to be stressed that there are other possible provisions, besides the ISDS clause, within the ECT that can impact the climate policy of a state. Moreover, there are arguments besides the one of legitimate expectations that can be used to challenge newly enacted climate policy. Since this contribution has mainly focused on the concept of legitimate expectations, it is only possible to draw conclusions based on the limited scope of the research conducted here. But since the FET standard can be seen as the ECT's most important substantive obligation for

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[260] See for example Nathalie Bernasconi-Osterwalder and Martin Brauch, "Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition" (2019) Transnational Dispute Management and Oskari Vaaranmaa, "The Energy Charter Treaty, Frivolous Claims and The Looming Threat of Investor-State Dispute Settlement" (2021) 8:2 Groningen J of Int'l L 270.
[261] Reuters, "German Cabinet Approves Exit from Energy Charter Treaty", 30 November 2022 and Arthur Nelsen, "France Becomes Latest Country to Leave Controversial Energy Charter Treaty", 21 October 2022, *The Guardian*.
[262] Elizabeth Meager, "COP26 Targets Pushed Back under Threat of Being Sued", 2 August 2022, *Capital Monitor*.
[263] Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement" (2017) 7:2 Transnt'l Evt L 229 and Nathalie Bernasconi-Osterwalder and Martin Brauch, "Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition" (2019) Transnational Dispute Management.

states, with the concept of legitimate expectations as its most important feature, it is nevertheless remarkable that there seems to be a lack of concrete examples where fossil fuel investors were able to challenge climate policy based on such arguments.

On the renewable energy side of the ECT's ISDS cases, a mass withdrawal could mean less favourable investment conditions for innovative green energy projects. Even though the EU framework could be seen as favourable towards renewable energy projects without the ECT, it is clear from past cases that some investors still favour the backstop of international arbitration.[264] Assuming that the ECT has a positive impact on the willingness of renewable energy investors to invest in the sector in the EU due to improved regulatory stability, this might be one downside to completely withdrawing from the treaty.

But even without concrete cases showing fossil fuel investors can claim millions in damages due to climate policies violating the FET standard, the mere possibility of this happening seems to be enough to have a negative impact. The *Vattenfall v. Germany* case, settled before it made it to a tribunal, and the 1.73 billion euro payout of the Czech energy company Leag by the German government because of its 2038 coal phaseout plan highlight this.[265] In all, a coordinated withdrawal from the ECT might turn out to be a net positive. Peace of mind can be worth a lot, especially when it means states finally gain the confidence to enact ambitious climate policy.

In an ideal world, EU Member States will successfully scale back their reliance on fossil-fuel-based power plants in the near future. In the end, this is the only way to avoid legal challenges of climate change policy initiatives completely. Then, there would be no need to get rid of the ECT and its ISDS provision, which could be used to promote investments in the renewable energy sector.[266] Based on an in-depth analysis of legitimate expectations cases, this contribution has shown that the climate impact of the ECT's ISDS provision should not be overstated. From a climate policy point of view, the EU has bigger fish to fry.

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[264] The government of Denmark for example stated the following after announcing their withdrawal from the ECT: "We have a framework in Danish legislation and in other international cooperation that ensures that investors can safely put their money into green projects both in Denmark and in other countries", see Charles Szumski, "Denmark to Withdraw from Energy Charter Treaty", 14 April 2024, *Euractiv*.

[265] Stuart Braum, "Multi-billion Euro Lawsuits Derail Climate Action", 19 April 2021, *Deutsche Welle*.

[266] At least not from a climate policy point of view. For a critical analysis of ISDS mechanisms in general, see for example Marina Kofman, "Investor-State Dispute Settlement Challenges and Reforms" (2018) 25 Austl Int'l LJ 49.

ANNEX A: SELECTION OF ENERGY CHARTER TREATY PROVISIONS

Art 10:

(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.

(2) Each Contracting Party shall endeavour to accord to Investors of other Contracting Parties, as regards the Making of Investments in its Area, the Treatment described in paragraph (3).

(3) For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable.

[…]

(7) Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.

Art. 13:

(1) Investments of Investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalised, expropriated or subjected to a measure or measures having effect equivalent to nationalisation 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.

Such compensation shall amount to the fair market value of the Investment expropriated at the time immediately before the Expropriation or impending Expropriation became known in such a way as to affect the value of the Investment (hereinafter referred to as the “Valuation Date”).

Such fair market value shall at the request of the Investor be expressed in a Freely Convertible Currency on the basis of the market rate of exchange existing for that currency on the Valuation Date. Compensation shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment.

(2) The Investor affected shall have a right to prompt review, under the law of the Contracting Party making the Expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its Investment, and of the payment of compensation, in accordance with the principles set out in paragraph (1).

(3) For the avoidance of doubt, Expropriation shall include situations where a Contracting Party expropriates the assets of a company or enterprise in its Area in which an Investor of any other Contracting Party has an Investment, including through the ownership of shares.

Art. 26:

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution:

(a) to the courts or administrative tribunals of the Contracting Party party to the dispute;
(b) in accordance with any applicable, previously agreed dispute settlement procedure; or
(c) in accordance with the following paragraphs of this Article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article.

(b) (i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b).

(ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41.

(c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to:

(a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute are both parties to the ICSID Convention; or

(ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention;

(b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or

(c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for:

(i) written consent of the parties to a dispute for purposes of Part II of the ICSID Convention and for purposes of the Additional Facility Rules;

(ii) an "agreement in writing" for purposes of article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958(hereinafter referred to as the "New York Convention"); and

(iii) "the parties to a contract [to] have agreed in writing" for the purposes of article 1 of the UNCITRAL Arbitration Rules.

(b) Any arbitration under this Article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of that Convention.

(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.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of article 1(6) of the Additional Facility Rules be treated as a "national of another State".

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a sub-national government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

ANNEX B: DETAILED METHODOLOGY ON QUANTITATIVE ANALYSIS OF CASES

Since this contribution focused on the FET cases in general, and cases where investors relied on legitimate expectations arguments in particular, it was interesting to compile a dataset excluding other ECT cases to get clearer results. As with any kind of quantitative analysis, it is important to be mindful that the conductor of the analysis always has an impact, even though the results might seem like 'objective' numbers. With this in mind, it is useful to provide a detailed account of the steps that were taken to reach the results discussed in this contribution.

1. <u>General Remarks</u>

The United Nations Conference on Trade And Development (UNCTAD) database on Investor-State Dispute Settlement Cases was the most logical starting point for the analysis. As an intergovernmental organization within the United Nations Secretariat, UNCTAD compiles all publicly known ISDS cases into a single database. Since it is possible to filter these cases based on numerous factors (claimant nationality, respondent, applicable treaty, outcome, …) through the 'advanced search' option, it is ideal for a quantitative analysis. It is thus unsurprising that numerous academic articles make use of this database for their research.[267]

This does not mean that the data compiled in the UNCTAD database is ready for analysis in the context of this contribution however. First and foremost, the database did not include a filter for cases featuring legitimate expectations arguments specifically. There is a filter for cases where investors relied on the fair and equitable treatment standard to establish a violation of the ECT, which allows for an easy way to exclude the cases only featuring expropriation or other arguments. But the cases featuring legitimate expectations arguments had to be filtered out manually.

Second, the database of the UNCTAD contains numerous cases that, if included in the final analysis, would distort the findings and render the conclusions unusable. To avoid skewed

[267] See for example International Institute for Sustainable Development, *Investor-State Disputes in the Fossil Fuel Industry* (Winnipeg: IISD Press, 2021) or Kyla Tienhaara et al., "Investor-State Dispute Settlement: Obstructing a Just Energy Transition" (2022) *Climate Policy*.

results, the dataset had to be cleaned before conducting the quantitative analysis. This process will be explained in more detail below.

2. <u>Compiling a Dataset Based on Legitimate Expectations</u>

Since the UNCTAD database does not include legitimate expectations as a variable, it was necessary to compile a database based on cases featuring legitimate expectations specifically. As mentioned in Part III, the concept of legitimate expectations is interpreted as being a part of the fair and equitable treatment standard. It is consequently not possible for a case to contain a legitimate expectations argument where a FET argument is absent. This means that we do not have to look at the 66 ECT cases where FET arguments were not invoked.

Through the 'advanced search' function of the UNCTAD database, the cases were filtered on two factors. 'Applicable International Investment Agreement (IIA)' was set to the ECT, and 'IIA breaches alleged' was set to fair and equitable treatment/Minimum standard of treatment, including denial of justice claims. This leaves 92 cases in the database. Since all these cases could possibly include legitimate expectations arguments, they would all need to be analyzed on whether the investor invoked such arguments, and whether the tribunal ended up finding a breach of the investor's legitimate expectations.

3. <u>Deciding what Variables Would be Useful to Analyse</u>

Now that a base dataset has been established, the next step would be to decide what exactly to look for in these cases. Since the goal was to study the concept of legitimate expectations specifically, it would without a doubt be necessary to determine which cases featured such arguments, and whether tribunals found breaches based on those arguments. Beyond that, however, it could also be interesting to see if there are correlations between legitimate expectations arguments and other factors. It could be that certain other variables have an impact on whether or not investors decided to invoke legitimate expectations arguments, or whether or not tribunals would decide on a breach.

The most interesting variable in this regard is without a doubt the economic sector attached to the investment. Since this contribution has attempted to compare ECT cases based on fossil fuel investments with renewable energy investments, it would be necessary to add this variable as well. Additionally, it could also prove interesting to see how the amounts of damages claimed and awarded relate to the legitimate expectations arguments, but also to the fossil fuel/renewable energy variable. A variable was thus added for the amount of damages claimed by the investor. For the cases where the tribunal found a breach of the ECT, a variable was added for damages awarded as well.

Additionally, some interesting correlations might exist between the aforementioned variables and the year the ISDS case was initiated. It could be that tribunals were less likely to award high amounts of damages in recent years for example. Lastly, a variable was included to determine whether the investor relied on the ECT alone, or also on a Bilateral Investment Treaty (BIT). It could be that tribunals were more likely to find a breach of the investors' legitimate expectations when they also invoked a BIT for example.

4. <u>Searching All 92 Cases in Function of those Variables</u>

The next step was to go over all the cases featuring FET arguments and establish what variables were present.

CASE NAME	DATE	ECT + BIT?	FOSSIL FUEL/RENEWABLE ENERGY	CASE OUTCOME	FET WITHELD?	LEGITIMATE EXPECTATIONS WITHELD?	DAMAGES CLAIMED (million eur	DAMAGES AWARDED (million eur
Nykomb v. Latvia	2001	No	Fossil Fuel	In favour of investor	FET argument not further analyzed	No legitimate expectations argument present	10	2,3
Petrobart v. Kyrgyzstan	2003	No	Fossil Fuel	In favour of investor	Yes, award based in part on FET	No legitimate expectations argument present	3,2	0,8
Plama v. Bulgaria	2003	Yes	Fossil Fuel	In favour of state	No breach of FET found	No breach of legitimate expectations found	112	0
Amto v. Ukraine	2005	No	Nuclear energy	In favour of state	No breach of FET found	No breach of legitimate expectations found	15	0
HEP v. Slovenia	2005	No	Nuclear energy	In favour of state	FET argument not further analyzed	No legitimate expectations argument present	26	0
Hulley Enterprises v. Russia	2005	No	Fossil Fuel	In favour of investor	FET argument not further analyzed	Legitimate expectations argument not further analyzed	67500	29600
Kardassopoulos v. Georgia	2005	Yes	Fossil Fuel	In favour of investor	Yes, award based in part on FET	Yes, award based in part on legitimate expectations	21,6	10,8
Veteran Petroleum v. Russia	2005	No	Fossil Fuel	In favour of investor	FET argument not further analyzed	Legitimate expectations argument not further analyzed	13650	6000
Yukos Universal v. Russia	2005	No	Fossil Fuel	In favour of investor	FET argument not further analyzed	Legitimate expectations argument not further analyzed	3000	1350
Azpetrol v. Azerbaijan	2006	No	Fossil Fuel	In favour of state	FET argument not further analyzed	No legitimate expectations argument present	210	0
Libananco v. Turkey	2006	No	Other	In favour of state	FET argument not further analyzed	No legitimate expectations argument present	7000	0
AES v. Hungary	2007	No	Fossil Fuel	In favour of state	No breach of FET found	No breach of legitimate expectations found	172	0
Electrabel v. Hungary	2007	No	Other	In favour of state	No breach of FET found	No breach of legitimate expectations found	638	0
Europe Cement v. Turkey	2007	No	Other	In favour of state	FET argument not further analyzed	No legitimate expectations argument present	2660	0
Liman Capsian Oil v. Kazakhstan	2007	No	Fossil Fuel	In favour of state	No breach of FET found	No legitimate expectations argument present	162	0
Alapli v. Turkey	2008	Yes	Fossil Fuel	In favour of state	FET argument not further analyzed	No legitimate expectations argument present	81	0
Al-Bahloul v. Tajikistan	2008	No	Fossil Fuel	In favour of investor	Yes, award based in part on FET	No breach of legitimate expectations found	190	0
Mercuria Energy v. Poland	2008	No	Fossil Fuel	In favour of state	No breach of FET found	No legitimate expectations argument present	296	0
EDF v. Hungary	2009	No	Fossil Fuel	In favour of investor	Yes, award based on FET alone	No legitimate expectations argument present	81	107
EVN v. Macedonia	2009	Yes	Other	Settled	FET argument not further analyzed	No legitimate expectations argument present	160	NA
Vattenfall v. Germany	2009	No	Fossil Fuel	Settled	FET argument not further analyzed	Legitimate expectations argument not further analyzed	1100	0
AES v. Kazakhstan	2010	Yes	Fossil Fuel	In favour of investor	Yes, award based in part on FET	No breach of legitimate expectations found	955	0
Energoalians v. Moldova	2010	No	Other	In favour of investor	Yes, award based in part on FET	Yes, award based in part on legitimate expectations	35	10,8
Stati v. Kazakhstan	2010	No	Fossil Fuel	In favour of investor	Yes, award based on FET alone	Yes, award based in part on legitimate expectations	1920	363
Khan Resources v. Mongolia	2011	No	Nuclear energy	In favour of investor	FET argument not further analyzed	Legitimate expectations argument not further analyzed	319	71
Mamidoil v. Albania	2011	Yes	Fossil Fuel	In favour of state	No breach of FET found	No breach of legitimate expectations found	20	0

Excerpt from the dataset compiled based on cases featuring legitimate expectations arguments

5. Cleaning the Dataset

When all the variables were filled in, the last step was to prepare the dataset for the final analysis. As mentioned before, certain cases were to be left out because they would distort the results. Cases not fitting into either the fossil fuel or renewable energy categories were excluded, as well as cases with missing information (because they were still pending or because of confidentiality reasons).

Some cases also had to be left out because of more substantive reasons. The Yukos cases because of the abnormally high amounts of damages, and the Czech cases because they were nearly identical. This meant 49 cases were analyzed in the end.[268]

[268] See Chapter V, Section 1.1 for a more detailed account of the data cleaning.

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