



The Rise and Fall of a Treaty: Is the EU's Withdrawal from the Energy Charter Treaty in Line or at Odds with Its Ambitions to Achieve a Locally Driven Energy Transition?

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Abstract. In order to meet the EU's climate goals, the Clean Energy Package envisages a fundamental transformation of the energy sector, a decentralisation away from fossil fuels towards renewable sources of energy with local energy communities playing a significant role in making the transformation publicly acceptable. But in a decentralised energy system – do we still need a multilateral energy treaty?

As of 28th June 2025, the EU is no longer a party to the Energy Charter Treaty (ECT). This chapter explores the impact of the EU's withdrawal on the protection of energy investments. It addresses the main criticisms of the ECT and takes a fresh look at the extent to which investment protection provisions in a multilateral energy treaty might contribute to a just energy transition by supporting a flow of private finance towards local communities. By doing so it provides a new perspective from which to judge the strengths and weaknesses of the ECT and argues that there is still a valuable discussion to be had about what lessons we can learn from this treaty and how these lessons can feed into a new investment regime that is in line with the EU's climate goals.

1 Introduction

It has been called a “climate wrecking treaty”¹, a “fossil fuel dinosaur”² and many things besides. As international treaties go, the Energy Charter Treaty (“ECT”) has had more than its fair share of controversy. In yet, when the Energy Charter Conference finally adopted an amended treaty text on 3rd December 2024³, following intense debate and a long, drawn-out modernisation process, it felt somewhat like an anti-climax. The Conference proceedings in December 2024 marked the end of the negotiations to modernise the ECT, which had begun in 2017 and had culminated in an Agreement in Principle being reached in 2022.⁴ Whereas the negotiation process and immediate aftermath of

¹ For example, Friends of the Earth Europe (2024).

² European Parliament, Plenary Session, Press Releases, 24.4.2024 (2024).

³ Energy Charter Secretariat (2024).

⁴ Energy Charter Secretariat (2022).

the Agreement in Principle were accompanied by fierce discussion around the potential dangers of the ECT, the actual decision to adopt the amendments more or less in line with the Agreement in Principle went ahead without much fanfare. The lack of media attention was probably due to the fact that most of the discussion and negotiations had already taken place and many parties, including Germany, the EU and the UK had already made the decision to withdraw.⁵ The fact that here, for the first time, there was a multilateral agreement which included a phase out mechanism for protection of investments in fossil fuels went largely unnoticed. Or might there have been an element of embarrassment that here was a treaty which allowed for a phase out of protection for existing fossil fuel investments after 10 years to which the EU, Germany and others were no longer Contracting Parties and who might now instead be locked into a protection mechanism for fossil fuel investors for twice as long under the ECT's sunset provision? As we shall see, the impact of the decision on those countries whose withdrawal has already become effective or whose withdrawal will soon become effective is not entirely clear. According to Article 47.3 of the ECT, the provisions of the treaty will apply for 20 years following the date that withdrawal becomes effective. But will the amended version of the ECT apply or the old version? And what of the newly worded Annex NI which specifically refers to a termination of investment protection for fossil fuel investments made on or after 3rd September 2025 for the EU and the UK? Will this annex be applicable, seeing that neither the EU nor the UK will be Contracting Parties to the ECT come September 2025? The interpretation of the treaty wording is ambiguous on this and will no doubt be the subject of deliberation in years to come when arbitrators try to determine which level of protection is afforded fossil fuel investors during the 20-year sunset period by those who decided to withdraw after the Agreement in Principle but before the amended text comes into force. The irony is that those countries who justified their withdrawal with the argument that the ECT was too protective of fossil fuel investors may find that they are locked into continued investment protection for existing fossil fuel investments during the sunset period, whilst others who remained in the ECT have the opportunity to end that protection.

2 Exodus from an Unpopular Treaty

On the 24 April 2024, about 9 months after the European Commission had announced that it was preparing for a coordinated withdrawal from the ECT, the European Parliament voted 560 to 43 in favour of exiting the treaty.⁶ This came after 11 states, including Spain, France, Germany and the UK, had already indicated that they intended to leave the ECT.

Broadly speaking, the majority of observers seems to have welcomed these announcements, following the number of high-profile cases of fossil fuel investors invoking the investor state dispute settlement (ISDS) provisions in Article 26 of the ECT. This Article gives foreign investors the right to make claims in international tribunals against

⁵ See Table 1 for the list of Contracting Parties that have notified the Energy Charter Secretariat of withdrawal since June 2022.

⁶ European Parliament, Plenary Session, Press Release (2024).

the host state for breaches of the ECT. Prominent examples of such claims are the Rockhopper case against Italy⁷, RWE and Uniper's claims against the Netherlands.⁸ Many critical voices amongst academics, campaigners, politicians and experts had concluded that the ECT is no longer fit for purpose and is unduly protecting fossil fuel investors. The general consensus has certainly been that the ECT has at least the potential to slow down the energy transition.⁹ Judging from the response to the Agreement in Principle that was concluded in 2022, many held the view that the Agreement in Principle to modernise the ECT had not adequately addressed these concerns and that on balance an exit from the treaty was preferable to staying in the ECT as amended by the Agreement in Principle. There followed a spate of notifications of withdrawal which will reduce the total number of Contracting Parties to the ECT from 53 to 42 come September 2025. The following countries (see Table 1) have now withdrawn from the ECT or have notified the Secretariat of the intention to withdraw:¹⁰

Now that the EU's position has been decided and some of the heat has been taken out of the debate, it is worth taking a step back and engaging in a spot of treaty soul-searching. Is it possible that the controversial investor state disputes between fossil fuel investors and states and the general stir they have understandably created have clouded our judgment as to whether a withdrawal from the ECT is in fact the greenest option? It is suggested here that this is not necessarily the case. The purpose of this chapter is not to advocate a revival of the ECT negotiations or to suggest that those countries that have decided to withdraw should remain in the ECT or rejoin. It is a little late for that and would not be feasible given the high threshold of mistrust that has developed around the ECT over the past few years. The aim is rather to demonstrate that the content and format of the current debate about investment in the energy transition is not bearing any fruit but instead is leading us into blind alleys. The perceived failings of the modernisation process are evidence that a different approach to investment protection may lead to a better outcome. The urgent need for private capital to finance the energy transition towards renewable energy sources has not dissipated and global investment in the energy sector is currently not flowing to where it should be. According to the World Energy Outlook compiled by the International Energy Agency (IEA), investment in oil

⁷ Rockhopper Exploration PLC, Rockhopper Italia S.P.A. and Rockhopper Mediterranean Ltd v Italy, ICSID Case No ARB/17/14

⁸ RWE AG and RWE Eemshaven Holding II B.V. v Netherlands, ICSID Case No ARB/21/4 and Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v Netherlands ICSID Case No ARB/21/22

⁹ Many commentators have made well-reasoned and convincing arguments as to why the Energy Charter Treaty in its old form had the potential to hinder the energy transition. See in particular N. Bernasconi-Osterwalder of the International Institute for Sustainable Development, M. Brauch from the Columbia Centre on Sustainable Investment, K. Tienhaara (Queen's University) & C. Downie (Australian National University) and Amandine van den Berghe, a lawyer for Client Earth.

¹⁰ According to Art. 47(2) of the Energy Charter Treaty, withdrawal takes effect one year after the date of a Contracting Parties notification of withdrawal. The list of countries is taken from Written Notification of Withdrawal from the Energy Charter Treaty Secretariat's website: <<http://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/>>. Accessed 14 April 2025.

Table 1. Contracting Parties that have notified the Energy Charter Secretariat of withdrawal since June 2022

Country	Effective Date of Withdrawal
France	8 December 2023
Germany	20 December 2023
Poland	29 December 2023
Luxembourg	17 June 2024
Slovenia	14 October 2024
Portugal	2 February 2025
Spain	17 April 2025
United Kingdom	27 April 2025
European Union and Euratom	28 June 2025
Netherlands	28 June 2025
Denmark	4 September 2025

and gas in 2023 was almost double what it should be if we are to reach our global net zero targets.¹¹ At the same time, the IEA estimates that there is a current shortfall of USD 4.7 trillion needed to finance the energy transition to clean sources of energy.¹² Furthermore, the current investment climate with high interest rates is increasing the costs for investors which poses challenges for investors in capital intense clean energy technology. This is particularly a problem for lower income countries with insufficient home-grown capital looking for foreign direct investment just at the time when the current international investment regime as formulated by the 1000s of bilateral investment treaties and trade agreements is coming under increasing scrutiny.

There is currently an additional challenge in that the majority of investment treaties but especially the Energy Charter Treaty are built upon the foundations of the global trading system and the WTO Agreements established since the creation of the WTO in 1995. This system is experiencing considerable strain with a stymied WTO dispute resolution mechanism following the inability to maintain a functioning Appellate Body, as well as recent volatility and uncertainty in international trade following the US Administration's trade and tariff policies.

As the incumbent investment treaty regime crumbles and the numerous withdrawals of countries leaves the ECT weakened and limited in its applicability, we need to look afresh at these issues and formulate a new legal framework that governs foreign investment in the energy sector. Whilst recent geopolitical developments on the global stage seem to be rewriting the rule book on international trade and investment, particularly in the energy sector, calling into question our prevailing assumptions and certainties, it may be a good time to reimagine what a new set of rules might look like. This chapter

¹¹ International Energy Agency (2023), p. 19.

¹² Ibid, p. 49.

does not seek to map out the shape of such a new framework but rather seeks alternative foundations upon which we can build a new and solid energy investment structure.

Where should we look for such foundations? When the Energy Charter Treaty was originally negotiated in the first half of the 1990s, the backdrop and context of the negotiations was the collapse of the Soviet Union and the urgent need to shore up the (mainly fossil fuel) energy infrastructure in the old Soviet block, and to bring Russia and the old Soviet satellite states into the emerging WTO trading system.¹³ 30 years later, the modern day backdrop to any formulation of a new investment regime is the climate crisis and the need for a transformation of our energy system. Our starting point in any endeavour to find new ground from which a new investment framework might emerge should therefore be the international climate obligations of the EU and its member states most notably under the Paris Agreement and the targets and goals of EU energy policy as formulated by the European Green Deal. One of the pillars of the EU's current energy policy is the decentralisation of the energy sector and the development of local energy communities¹⁴, it therefore makes sense to examine the potential benefits a reformed ECT may have had on investment in local energy projects. It is proposed that ISDS provisions in an international treaty could be made to facilitate the flourishing of community energy projects, if anchored within a regulatory regime that enables cooperation of public and private investment at local level.

However, it would not be worth replicating key provisions of a treaty that is hindering a phase out of fossil fuels simply to allow for a possible future benefit that has not yet quite materialised. Therefore, if we want to explore the possible impact of investment protection and ISDS on a decentralised, locally driven energy transition, we first need to examine whether there is more or less scope for a phase out of protection for fossil fuel investors for those countries who have withdrawn or are about to withdraw from the ECT.

3 The Impact of Withdrawal on Investment Protection for Fossil Fuel Investors

The EU's goal is to reduce net greenhouse gas emissions by at least 55% by 2030 compared to 1990 levels and to be the first climate neutral continent by 2050.¹⁵ This requires a deep-rooted transformation of the energy sector. The rationale for exiting the ECT was, therefore, that it is slowing down the energy transition because it restricts the EU's policy space to implement the Green Deal. From this, it would follow that it is the EU's goal to deal with fossil fuel investors in such a way that would represent a breach of the provisions of the ECT, perhaps suggesting that there is a clear policy to phase out or at least restrict fossil fuel investment protection in the immediate future.

In order to assess whether a withdrawal from the ECT is in line with the EU's climate ambitions, it is necessary to compare investment protection that will be afforded

¹³ The Uruguay Round of talks that culminated in the formation of the WTO were being conducted at the same time as the negotiations around the Energy Charter Treaty and there is specific reference and alignment to the WTO Agreements in the ECT.

¹⁴ European Commission (2019), 'Clean Energy for All Europeans'.

¹⁵ European Commission, Energy, Climate Change, Environment (2024).

to fossil fuel investments after a withdrawal with a possible scenario of phasing out such protection by remaining in a reformed ECT. The conclusion drawn here is that currently there would be more scope for restricting investment protection for fossil fuels if the “Exiteers” had stayed in a reformed treaty than withdraw from it. Once we have dealt with the legitimate concern that an ECT, even in its modernised form, would slow down a phase out of protection for fossil fuel investments, we can then move on to ask the question what else might be lost by withdrawing from the ECT. The findings suggest that some of the disputed provisions of the ECT could still be aligned with the EU’s ambitions under the Green Deal by encouraging private investment in local energy projects and that attempts to establish a decentralised energy sector, in which communities play a more active role would be helped rather than hindered by the possibility of investor state dispute resolution. It is proposed that more research is needed to determine whether larger stumbling blocks might not in fact be found elsewhere, such as within the definitions of ‘renewable energy communities’ and ‘citizen energy communities’ contained in the latest Electricity and Renewable Energy Directives¹⁶ and within some of the provisions of the WTO rules on local content requirements and EU restrictions on state aid.

3.1 The Agreement in Principle to Modernise the Energy Charter Treaty

To those who had been following the negotiations for the modernisation of the ECT closely, it had come as quite a surprise when, on 24 June 2022, the ECT Secretariat announced that the Contracting Parties to the Energy Charter Treaty had settled on an agreement in principle to modernise the treaty. Contrary to what everyone had expected, it seemed as if most proposals of the EU had been adopted. Most notably, there was reference to alignment to the goals of the Paris Agreement, tighter definitions of ‘Investment’, ‘Investor’, ‘Fair and Equitable Treatment’ and ‘Indirect Expropriation’ with a carve out for non-discriminatory measures adopted with respect to climate change mitigation and adaptation. The parties had also agreed on a new article confirming the right to regulate in the interests of public policy objectives, including climate change mitigation and adaptation, a new article on sustainable development and corporate social responsibility and an obligation on Contracting Parties to ensure responsible business conduct of investors in their area. Furthermore, as well as a duty to declare third party funding and tightening the valuation of damages, the EU had negotiated a release from Article 26 for intra member states disputes by forming a Regional Economic Integration Area within which the controversial ISDS provisions would not be applicable, thereby putting to rest the recent *Achmea / Komstroy* upheaval in EU investment law and the question of how intra EU disputes between member states of the EU would fare, at least within the realms of the Energy Charter Treaty. And then, maybe most promising, a flexibility mechanism that gave states the option of phasing out investment protection for fossil fuels – the first time there has ever been an attempt within a treaty to target

¹⁶ See Art 2(11) Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast), OJ L 158, p. 125, 14.6.2019 and Art 2(16) EU 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), OJ L 328, p. 82, 21.12.2018.

fossil fuel investments directly. Whilst there would be no immediate stop to investment protection, Contracting Parties would have the option to carve-out protection for fossil fuel investments in their territory. The EU and UK had already indicated that they would opt for a carve-out of protection for new investors in fossil fuels after one year and for existing investors after 10 years.¹⁷

It seemed like a genuine breakthrough with the proposals put forward by the EU adopted almost in their entirety – that is until the notifications of withdrawals started coming in to spoil the party.

As mentioned above, the reasons given for the withdrawals mainly centre around the continued protection of fossil fuel investors. The German Ministry for the Economy and Climate Protection states that Germany left the ECT because it is a barrier to climate protection and the energy transition and because the Agreement in Principle falls short of Germany's climate goals.¹⁸

In a statement on 7 July 2023, the European Commission said:

“Despite fulfilling all the requirements of the negotiating mandate given by the Council, Member States did not find the necessary majority to ratify the modernised Treaty, as proposed by the European Commission in October 2022. Given this situation, a coordinated withdrawal by the EU, Euratom and all EU Member States is now the most consistent approach from a legal and policy perspective.”¹⁹

Anna Cavazzini, rapporteur for the Trade Committee is quoted as saying:

“Finally, the fossil dinosaur treaty is no longer standing in the way of consistent climate protection, as we no longer have to fear corporate lawsuits demanding billions of Euros in compensation brought before private arbitration tribunals.”²⁰

To many campaigners the EU's withdrawal from the ECT seems like a fitting and successful conclusion to a long campaign to end the powerful protection mechanisms for the fossil fuel industry that emanate from the Articles of the ECT.

But before we heave a sigh of relief at the thought that at least one barrier to a successful and speedy energy transition has been removed, we should be clear that following the Agreement in Principle, the choice was no longer between the old and tired ECT with its whiff of 90s neoliberal optimism. The choice is between an ECT amended as per the proposed Agreement in Principle or not being in the ECT altogether. This changes the goal posts, and the discussion should now also shift to account for the new circumstances in which it finds itself.

Whilst the arguments given to justify an exit would have been valid against the old version, they now have to stack up against a modernised version.

Much of the debate around the modernisation of the ECT has circled around potential dangers, the fact that there is at least a possibility that policy changes will not happen

¹⁷ Energy Charter Secretariat (2022), Decision of the Energy Charter Conference, CCDEC 22, 10 Gen, 24.6.2022.

¹⁸ Bundesministerium für Wirtschaft und Klimaschutz (2022a).

¹⁹ European Commission Announcement, DG Energy (2023).

²⁰ European Parliament, Plenary Session, Press Releases (2024).

because there is the threat of claims made by fossil fuel investors against governments trying to commit to their climate goals. These are very plausible concerns. But rather than look at the theoretical impact, let us look at the actual impact on the level of fossil fuel protection that we can in fact measure:

Let us compare two scenarios:

Scenario 1:

The Agreement in Principle was implemented as planned by all parties in November 2022 and the UK and EU did decide to take advantage of the flexibility mechanism in Pillar 2 of the Energy Charter Conference decision to phase out investment protection for fossil fuel, as they had indicated that they would.

Outcome:

UK and EU investment protection (and any other country who would have decided to join the phase out – presumably this would have included those countries who have now chosen to withdraw due to the fact that the phase out is currently not quick enough, so Germany, Belgium, France, Luxembourg, Netherlands, Poland, Portugal, Slovenia, and Spain) would have stopped on 15th August 2023 for any new investments in fossil fuels. For existing investments in fossil fuels, protection would have ended 10 years later, i.e. August 2033.²¹

Scenario 2 – The current scenario

The ECT is modernised on 3 December 2024 after some withdrawals have already taken effect (e.g. France, Germany and Poland) whilst others will take effect before the proposed adoption of the amended treaty text in September 2025.

Outcome:

For those countries whose withdrawal had already been effective before the decision of the Energy Charter Conference on 3 December 2024 (France, Germany, Poland, Luxembourg and Slovenia) the date on which investment protection under the ECT for existing investments in all energy sources (fossil fuels and renewables) will end is 2043/2044, due to the 20-year sunset provision in Article 47(3), for fossil fuel investments 10 years later than if they had remained party to the ECT and opted for the phase of investment protection. Italy, who withdrew from the Energy Charter Treaty in 2016 has since been subject to 7 claims,²² 4 of which were still pending at the time of writing.²³ Furthermore, any future claims brought by existing fossil fuel investors before the end of the sunset period are dealt with under the old, unamended treaty text.

Investment protection for new investments in all sources of energy under the ECT ceased from the effective date of withdrawal, so only a few months later than if they had remained party to the ECT, although now, of course, the investment protection for investments in renewable energy under the ECT has also been lost for any new investments in renewable energy.

For those countries who are still party to the ECT but have given notification of their withdrawal (eg the EU and the UK), the situation is more complicated.

²¹ Energy Charter Secretariat (2022).

²² Ekardt et al. (2022), p. 353

²³ Energy Charter List of Cases. In: <https://www.energychartertreaty.org/cases/list-of-cases/>. Accessed 25 Aug 2025.

The modifications to Annex NI, which lists Energy Materials and Products that are excluded from the provisions of the treaty, make specific reference to an exclusion by the EU and the UK of protection for fossil fuel investments made on or after 3 September 2025 and an exclusion of protection for investments in fossil fuels that are made before 3 September 2025 in 10 years from the date of entry into force of the approval to modify Annex NI (i.e. 3 September 2025).²⁴

The modifications of Annex NI relating to the exclusion of future fossil fuel investments will enter into force on 3 September 2025. The modifications relating to fossil fuel investments made before 3 September enter into force in the same way as the amendments to the main treaty text, i.e. 90 days after they have been ratified or approved by 3/4ths of the Contracting Parties amongst those CPs that have ratified or approved and for any other CP 90 days after it has ratified or approved the modifications. However, both the amendments to the treaty text as well as the modifications to Annex NI will apply provisionally from 3. September 2025 until they come into force.²⁵

For the EU and the UK this means that the amendments and modifications' provisional application begins after the effective date of withdrawal and within the sunset period.

The full wording of the sunset provision in Art. 47(2) is as follows:

"The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when the Contracting Party's withdrawal takes effect for a period of 20 years from such date."

There is considerable uncertainty on how the approved amendments and modifications to the ECT will apply to those that are about to withdraw. Law firms are advising their clients to carefully consider the impact of the amendments and modifications on current and planned investments. Eversheds Sutherlands concludes that the effect of the changes to Annex NI on the UK and the EU are yet to be seen.²⁶ Oliver Hailes in his recent examination of environmental clauses in investment arbitration assumes that the amendments and modifications of the ECT will not apply to those who are to withdraw before the 3 September 2025.²⁷ Yet, whether they do or don't, no one can plausibly argue that the EU or the UK have fewer obligations towards fossil fuel investors now than if they had remained in the ECT. In fact, there is a very real possibility that by withdrawing they have extended protection for fossil fuel investments rather than shortened it.

3.2 Recent Investment Activity in the Fossil Fuel Sector

We can already see the impact of the decision not to remain in a modernised ECT. There are a number of large new coal, oil and gas projects that have recently received funding.

²⁴ Decision of the Energy Charter Conference (2024), CCDEC 2024 13 GEN, Section B and C.

²⁵ Decision of the Energy Charter Conference (2024), CCDEC 2024 15 GEN.

²⁶ In: <https://www.eversheds-sutherland.com/en/united-kingdom/insights/modernisation-of-the-energy-charter-treaty-approved-what-investors-need-to-know>. Accessed 25 Aug 2025

²⁷ Hailes (2024), p. 25

It is difficult to determine just how many but an analysis by the German NGO Urgewald claims that 96% of exploration and extraction production companies have expansion plans and that short term expansion plans have increased by 20% since 2021.²⁸

Despite the International Energy Agency warning in 2021 that no new fossil fuel projects should be approved if we want to tackle climate change²⁹, there are numerous large projects that have received the green light since then, although not all within the territory of the Contracting Parties of the ECT. The biggest projects are apparently being planned by Saudi Aramco, Qatar Energy and Abu Dhabi National Oil Co, followed by Exxon, Mobil, TotalEnergies and Chevron.³⁰ According to Urgewald's figures, Shell has invested nearly £10bn into oil and gas projects (as opposed to the £3bn it has invested in renewables).³¹ Of its planned oil and gas field developments 57% are incompatible with the 1.5 degree model scenario mapped out by the IEA in 2021. If we believe the figures, Equinor has spent USD 1.139 billion and BP USD 858 million since 2021 on searching for new oil and gas reserves.³²

The Guardian reported in March 2023 that the UK had supported the fossil fuel industry with £20bn more investment than renewables since 2015. Between 2020 and 2021, the UK government's support for fossil fuels showed a 10.7% increase.³³ And a UK Government analysis from April 2022 has indicated that the North Sea Transition Authority intended to launch a licensing round with a view to extracting the estimated 7.9 billion barrels of oil that remain under the sea and 560 billion cubic meters of gas.³⁴

One concrete example is the oil exploration project under the Rosebank Field Development Plan for which Norwegian investor Equinor received the final go ahead from the North Sea Transition Authority on 27th September 2023.³⁵

Had the Agreement in Principle been adopted as planned in November 2022 and had the UK made use of the flexibility mechanism as it has announced that it would, this investment would not have fallen under the protection provisions of the ECT, it having been approved one month after the phase out of protection for new fossil fuel investments would have taken effect. Equinor claims that the project will generate a total of £8.1bn direct investment in its lifetime.³⁶ Even though the UK has recently announced its intention to withdraw, this investment will now be protected under the ECT for at least 10 years (20 years if the unamended version of the treaty applies).

The Rosebank licence is unlikely to be the only example of recent investment activity in fossil fuels in the UK. In July 2023 Rishi Sunak, the prime minister at the time said that the UK government intended to 'max out' the UK's fossil fuel reserves when he

²⁸ Carrington (2022).

²⁹ International Energy Agency (2023), p. 212

³⁰ Urgewald Media Briefing (2023).

³¹ European Commission Announcement, DG Energy (2023).

³² Urgewald Global Oil and Gas Exit List, in: <https://gogel.org/>. Accessed 25 Aug 2025.

³³ Horton (2023).

³⁴ UK Government Policy Paper, British Energy Security Strategy (2022).

³⁵ Equinor Announcement 27 September 2023, in: <https://www.equinor.com/news/20230927-rosebank-field-to-progress-in-the-uk>. Accessed 25 Aug 2025

³⁶ Ibid.

unveiled plans to authorise more than 100 new North Sea licences in July of 2023.³⁷ The current Labour government has since backtracked on this policy. But in January 2024, the UK's North Sea Transition Authority announced it had issued another 24 oil and gas licences to a total of 17 companies, including Shell, BP, Equinor, Total and NEO Energy. These licences only cover 74 out of a total of 900 blocks that have been made available. The rest are still subject to environmental evaluations,³⁸ but it is possible that some of these licences will have already resulted in some initial foreign investments and / or legitimate expectations of future profits.

According to a news report from Euronews in 2021, the UK was planning at least 40 fossil fuel projects, including a new coal mine in Cumbria, and extracting oil in Surrey. If these reports are accurate, then companies were seeking approval for 30 offshore oil and gas projects, 7 onshore and 3 coal mines during the years 2021 to 2025.³⁹ Although it was unclear at the time of writing which of these had received licences and to what extent any foreign investor interests have been created before the UK's effective withdrawal date in April 2025.

Within the EU there have also been some eye-catching new developments following the Russian invasion of Ukraine and the resulting worries about energy supply. The EU Agency for the Cooperation of Energy Regulators (ACER)'s opinion on the Hydrogen and Natural Gas TYNP 2022 highlights that in 2022 there was around 30bn worth of planned investment into new gas infrastructure, at least 40% of which was in conventional natural gas or infrastructure projects.⁴⁰ Investment into any of these planned projects coming to fruition since August 2023 would have fallen outside of the ECT's investment protection provisions had the Agreement in Principle been adopted and if the countries adopting these plans had taken the opportunity to phase out the investment protection provisions for fossil fuels.

Particularly in Germany, heavily depended on the import of Russian gas at the time of the invasion of Ukraine, the newly elected coalition government was faced with difficult choices about how to secure its energy supply. As a result, Germany called on G7 states to work with third countries to develop new gas fields and according to the Financial Times pushed for a watering down on commitments to end financial support for fossil fuels in order to tackle the energy crisis. The 2022 G7 statement said publicly supported investment in the gas sector can be appropriate as a temporary response to the exceptional circumstances created by the war in Ukraine⁴¹ At the same time as asking for a delay in the planned phase out of financial support for fossil fuels at the G7 summit, Germany indicated its intention to withdraw from the ECT claiming that it was slowing down the energy transition because the phase out of support for fossil fuel investors was too slow.⁴²

³⁷ BBC 6 o'Clock News (2025).

³⁸ North Sea Transition Authority (2024).

³⁹ Euronews (2021).

⁴⁰ European Network of Transmission System Operators for Gas (2022) and ACER Opinion on TYNDP (2022).

⁴¹ Mooney et al. (2023).

⁴² Bundesministerium für Wirtschaft und Klimaschutz Eckpunktepapier (2022b).

Even after a withdrawal from the Energy Charter Treaty, there are still a large number of bilateral investment treaties in place that would cover those fossil fuel investments that are no longer protected by membership of the ECT. Staying with Germany for the moment, Germany has investment treaties in place with all non-EU countries that are also signatories of the ECT, except for Japan and Iceland, which are covered by other trade agreements. The investment protection provisions may not all be as strong as those found in the ECT, but most will contain standard investment protection provisions, including ISDS.⁴³ A withdrawal from the ECT will not affect any protection afforded fossil fuel investments under those treaties. However, there is an argument that any amendments to the ECT that are incompatible with those BITs would prevail pursuant to Article 30 of the Vienna Convention, thereby potentially limiting those BITs for those countries who remain party to the treaty⁴⁴ - so not for Germany.

There may have been very good reasons for the many decisions to withdraw from the ECT. However, withdrawing in order to achieve a quicker phase out of investment protection for fossil fuel investors does not seem to be one of them. If we look at the question purely from the point of view of ending protection for fossil fuels, then it would seem that staying party to the ECT and adopting the Agreement in Principle would have allowed for a speedier end to protection in fossil fuels than withdrawing.

Remaining a Contracting Party would also have paved the way for tribunals to adopt the amended, more climate focused interpretation of the drafting in future claims brought by existing fossil fuel investors against governments seeking to honour their obligations under the Paris Agreement, which those who withdrew before the modernised version comes into force will no doubt face during the 20 years 'sunset' period. Any such claims are now likely to be considered under the old wording rather than the modernised one. And just at a time when investors in renewable energy are facing an increasingly uncertain international investment climate the investment protection the ECT afforded investors in renewable energy is no longer applicable.

To conclude, the withdrawal from the ECT by the EU cannot therefore be said to be in line with its policy to phase out fossil fuels and implement a speedy energy transition towards renewable sources of energy.

3.3 Moving on from the Fossil Fuel Debate

The protection for fossil fuel investors has, understandably, dominated the discussion. However, it has also obscured some of the other aspects of the ECT and has invalidated any arguments that point to its potential benefits - because what is the point of any benefit when there is the large elephant of fossil fuel protection blocking the way in the middle of the room. A treaty that stops governments from implementing a phase out of fossil fuels is a hindrance, no matter what its other benefits may be. But having now moved the elephant along, we can get a clearer view on what investment protection provisions, including ISDS can offer.

⁴³ See UNCTAD Investment Policy Hub. In: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/78/germany>. Accessed 25 Aug 2025

⁴⁴ Vienna Convention on the Law of Treaties, United Nations, Treaty Series Vol 1155, p. 331, 235.1969, art. 30.

It is often cited as a counter argument to its critics, that in fact the ECT also protects renewable energy investors and therefore has the potential to support the energy transition. Here, we can cite the many awards that have already been granted in favour of renewable investors. These exceed those of the fossil fuel industry, if not in the overall amount (mainly due to the large award granted in the Yukos case), then at least in the number of awards.⁴⁵

But is this a valid argument? As we recalibrate the parameters of the international investment framework is there still room for ISDS? To argue convincingly that there is, we would need to show that ISDS and investment protection for foreign investment is useful in the context of current EU energy policy. In other words, can investment protection provisions help establish an energy transition based on a decentralised energy infrastructure and community participation in energy production?

This is an angle that has not yet been considered in any detail, if at all, and that is whether the ECT, has any relevance on investment in local energy communities, one of the pillars of EU energy policy. It is argued here, that even if, *de facto*, the ECT is in its dying days, there may yet be an argument to develop some of the principle provisions for a new and improved energy treaty, possibly in the form of a strengthened and legally binding implementation of the International Energy Charter – which is currently a non-binding statement of political will made by 90 countries. To explore this potential, we need to take a closer look at EU energy policy.

4 EU Energy Policy and the Decentralisation of the Energy Sector

The EU has set itself the target to achieve carbon neutrality by 2050.⁴⁶ There are currently two main obstacles to achieving this goal: lack of finance and local opposition.⁴⁷ Furthermore, the energy transition requires a fundamental change in the way we produce, distribute and consume energy, in other words an energy sector shake up that, ideally, would be built on renewable energy sources, tackle fuel poverty and that is widely accepted by the public. Local energy communities are central to achieving this goal. The EU's Clean Energy Package set out a number of policy initiatives that firmly places community energy at the heart of the coming energy revolution.⁴⁸ It is easy to see why this appears to be a promising pathway. The Commission for the Environment, Climate Change and Energy 2018 concluded that in order to implement the EU climate and energy policy objectives there would need to be a move towards a decentralised energy system and a change in the roles of energy producers and consumers.⁴⁹

⁴⁵ International Energy Chapter News (2023).

⁴⁶ Rockhopper Exploration PLC, Rockhopper Italia S.P.A. and Rockhopper Mediterranean Ltd v Italy, ICSID Case No ARB/17/14.

⁴⁷ European Committee of the Regions Commission for the Environment, Climate Change and Energy (2018).

⁴⁸ See EU Clean Energy Package 2019. In: https://energy.ec.europa.eu/topics/energy-strategy/clean-energy-all-europeans-package_en. Accessed 25 Aug 2025.

⁴⁹ European Committee of the Regions. Commission for the Environment, Climate Change and Energy (2018).

This in turn will be hard to achieve if local communities do not accept this very visible change to their local landscapes. Research shows that local acceptance of energy infrastructure – wind turbines, solar panels etc. is strongest when there is a tangible benefit in the form of some kind of participation, both financially and democratically.⁵⁰ According to a number of studies and surveys, there is a positive correlation between the development of community energy projects and support for local renewable energy.⁵¹ This is particularly true of communities of place.⁵² In a comparison of acceptance levels among 320 residents of Zschadras in Germany who formed a citizens renewable energy (CRE) initiative and the neighbouring town of Nossen, where a traditional corporation built a wind farm, Musall and Kuik found that the CRE project in Zschadras led to a higher rate of acceptance not only to the local wind farm but also of wind energy in general.⁵³ Bauwens & Devine Wright⁵⁴ and Schumacher⁵⁵ have also shown that CRE projects with local citizen participation make citizens more supportive, not just of local renewable energy infrastructure but more generally of public policies and trends in favour of renewable energy and climate action.

This suggests a possible way out of the conundrum that although the majority of the population are in favour of an expansion of renewable energy (in Germany, for example, 93% are in favour of scaling up production of energy from renewable sources⁵⁶), when it comes to agreeing to such installations within their locality there is an element of Nimbyism at play, i.e. that people support the energy transition, so long as it is not happening in their back yard.

A decentralised approach in which citizens can participate in the shaping of their local energy transition might also allow for different approaches and views of the energy transition to emerge. Some communities that are currently heavily reliant on fossil fuels or whose livelihoods currently depend on the production of fossil fuels will take a different approach, a rural community will not have the same priorities and approaches as an urban centre. Different communities will have a variety of diverging attitudes and cultures and there may be different things that they are keen to protect or nurture, as well as differing levels of ability or willingness to participate.⁵⁷

And then, of course, there is the key factor that community energy can make energy cheaper. In Feldheim, just over an hour's drive from Berlin, the electricity grid is run by a 100% renewable energy community. 150 citizens raised 3000 Euros to participate in the acquisition of the grid from private company E.on. The grid is now owned by Feldheim Energie GmbH & Co Kg. Energiequelle GmbH is the general partner. Since the takeover of the grid energy bills have been reduced by 31% and citizens have a

⁵⁰ See for example studies by Bauwens and Devine-Wright (2018); Bauwens (2016) and Roberts et al. (2014).

⁵¹ Musall and Kuik (2011).

⁵² Fast (2013).

⁵³ See UNCTAD Investment Policy Hub.

⁵⁴ Devine-Wright and Bauwens; Bundesministerium für Wirtschaft und Klimaschutz Eckpunkt-papier (2022b).

⁵⁵ Schumacher (2019).

⁵⁶ Staab (2016).

⁵⁷ Velasco-Herrejon et al. (2022).

say in price regulation.⁵⁸ On Energiequelle's website, a spokesperson from the John Laing Group in London, an international investor in infrastructure projects, provides an endorsement for the Energiequelle's investor page, an example of how international investment can be successfully married up with local energy communities.⁵⁹

EU energy policy has taken this on board and has provided policy space to enable citizen participation in energy projects to flourish, most notably in the provisions of the Renewable Energy Directive II⁶⁰ and the recast Electricity Directive.⁶¹ Great importance is placed on the development of the prosumer and in building local energy communities where citizens are encouraged to participate in the production and distribution of energy. Local authorities and sub national and regional authorities are called upon here to develop and facilitate these. In the words of the REScoop EU website: "Regional and national authorities as well as their support networks have a crucial role to play in developing and communicating tools and approaches to designing procedures in support of community ownership."⁶²

There is a great opportunity here to direct the energy transition towards more energy democracy and to create value for local communities, rather than extracting value from them.

One challenge, however, is that more investment is needed than citizens and local authorities or even governments are likely to be able to raise from the public purse. As we have seen at both global and EU level, access to funding for the energy transition remains a challenge, whether at national or local level. If funding is an issue for the EU and its member states with its relatively full public coffers and the political motivation to direct funds towards the energy transition, it will pose an even greater challenge for countries with a smaller wallet.

A 2022 study by Broska et al. concluded that a citizen-driven energy transition is unlikely to be successful unless access to finance can be improved.⁶³ The study envisages more public funding in the form of subsidies, feed-in tariffs etc. But given the funding gap, this will be expensive. However, private finance is often also difficult to raise. Because energy communities are usually geared towards community interest rather than profit and operate on a 'one member one vote' system of governance, they are not necessarily attractive to a private investor.

This may be the reason why investment treaties are not seen as relevant to community owned enterprises. There is currently no literature that draws a connection between the investment protection provisions in the ECT and local energy communities. Likewise local authorities and managers of local energy communities on the whole do not see the ECT as relevant to their local enterprise. In fact, even 2 years ago interviews with stakeholders in local energy were rarely aware of the existence of the ECT, although

⁵⁸ Roberts et al. (2014), p. 75; UNCTAD Investment Policy Hub.

⁵⁹ Energiequelle GmbH. In: <https://www.energiequelle.de/en/investors/>. Accessed 25 Aug 2024

⁶⁰ Directive (EU) 2018/2001.

⁶¹ Directive (EU) 2019/944.

⁶² European Federation of Renewable Energy Cooperatives (2018).

⁶³ Broska et al. (2022).

this has changed in recent years due to the increased media attention the treaty has attracted.⁶⁴

Does that mean then, that an international investment treaty is not relevant to local energy communities? - far from it. Pursuant to Article 23 of the ECT, the ISDS provisions already apply to local energy infrastructure projects to the extent that they involve foreign direct investment.

5 Article 23 of the Energy Charter Treaty

The link between the Energy Charter Treaty and local energy systems lies in Article 23 which makes Contracting Parties responsible for making sure that regional and local governments within their area comply with the ECT. Article 23(3) states that:

“The dispute settlement provisions in Parts II, IV and V of this Treaty may be invoked in respect of measures affecting the observance of the Treaty by a Contracting Party which have been taken by regional or local governments or authorities within the Area of the Contracting Party.”⁶⁵

Pursuant to Article 23 therefore, the dispute resolution provisions in Article 26, including the controversial investor-state dispute resolution mechanism, would bite in the event that a local authority takes measures that are in breach of the ECT for the duration of a state’s membership of the ECT and for a further 20 years after any date of withdrawal due to the sunset provision. At first glance this may be a worrying prospect. Although under international law, Article 23 is not a novel provision. It mirrors similar provisions in the GATT adopted in 1994 and follows customary international law rules on attribution as codified in the UN International Law Commission Articles on State Responsibility.⁶⁶

A decentralisation of energy production and a greater role of local municipal authorities in shaping energy policy has the potential of widening the reach of the ECT to local energy communities. There is not much commentary on this Article, although it was one of the more controversial treaty provisions during the original negotiations between the contracting parties. The US, in particular, found this Articles problematic due to its federal system of government.⁶⁷ Within the EU governance structure, sub national authorities also play a significant role as they are closest to the citizen and therefore, following the principle of subsidiarity defined in Article 5 of the Treaty on the EU, decisions should be taken by municipalities wherever this is possible.⁶⁸

Article 23 could have far-reaching implications for current EU energy policy. If we are giving local authorities more responsibility in shaping the energy transition, then there will be more scope for breaches of the ECT at local level.

⁶⁴ These preliminary findings are part of an ongoing study being conducted by the author on the legal framework governing local energy communities in Germany, which due to be completed in 2025.

⁶⁵ Art 23(3) The Energy Charter Treaty 1994.

⁶⁶ Hober (2020).

⁶⁷ Grasso C (2018).

⁶⁸ Ibid, 23.10.

Some may plausibly argue, that this should not be a problem, as surely there are no foreign investors in local energy communities. Broadly speaking, this is indeed currently the case. In Germany, as at December 2022, only 4% of investors in local energy communities were companies and an even smaller percentage were foreign investors.⁶⁹ This is most likely due to several reasons. Most foreign investors are currently invested in larger, possibly more profitable enterprises. And of course, it is likely that most community owned energy projects will have been set up using some form of not-for-profit organisational structure.

6 EU Definitions of Community Energy

At this stage it helps to clarify what the EU defines as a local energy community. There are currently two different definitions of energy communities in circulation. The first can be found in Article 2(11) of the new Electricity Directive which defines “citizen energy communities” as a legal entity that is controlled by natural persons, local authorities and small enterprises and “has for its primary purpose to provide environmental, economic or social community benefits to its members or shareholders or to the local areas where it operates rather than to generate financial profits”.⁷⁰

The second is the definition of “renewable energy communities” in Art 2(16) of the Renewable Energy Directive which, unlike the definition of “citizen energy communities” ties the community to its locality and requires a legal entity that is effectively controlled by shareholders or members “that are located in the proximity of the renewable energy projects that are owned and developed by that legal entity”, which can include natural persons, local authorities and small and medium sized enterprises. The definition also stipulates the same required purpose as being one that is primarily not for profit but adds that it needs to benefit the shareholders, members or the local area.⁷¹ There is thus rightly a focus on creating value for the community. On the other hand, these definitions do not leave much room for private investors.

In yet, as we have seen, private investment is needed to fill the funding gap. Not only are private investors well placed to provide finance, they also bring valuable technical expertise. Whilst local communities might be understandably wary of inviting foreign investors to invest in their local energy infrastructure, particularly if they are protected by ISDS in international treaties, there is also a great opportunity here. Investors will be investing in local communities with some form of citizen participation. And therefore, community interest will be a determining factor in formulating the conditions for their investment and shape their legitimate expectations. These will limit the amount of claims that they will be able to successfully make which are pitched against community interests, whilst at the same time, having protection at treaty level will provide at least some insurance against the apparent risks of investing in local community projects. But why would investors invest in these projects? Because, if we play our cards right, investors will have no choice if they want to do business. The EU guidance for Public Procurement allows authorities to put limitations and requirements on renewable energy

⁶⁹ Dannemann (2022).

⁷⁰ Directive (EU) 2019/944.

⁷¹ Directive (EU) 2018 /2001).

developments,⁷² and municipalities are increasingly making use of these powers. In 2020, Strasbourg for example, only allowed organisations taking the form of “citizen energy communities” to participate in the tender process for the development of a wind park.⁷³ Therefore, if private investors and developers in renewable energy infrastructure want to have a presence in local energy, they would need to set up business models that include community participation and ownership. However, in return they will need to be able to generate a profit, which would disqualify the project from falling under the definitions of renewable or citizen energy communities. On the other hand, operating on a profit basis puts such communities in danger of falling within the remit of the WTO rules and fall foul of the local content requirement restrictions as well as making it harder for the EU to circumvent its own rules on state aid, subsidies and competition.

7 Klixbuell – a Profitable Energy Community

These matters require further research, but if these difficulties could be overcome, it would make for a happier marriage between private and public ownership of energy infrastructure. One example of how this might operate in practice is the small local community of Klixbuell in the North of Germany close to the Danish border. The village produces 100% of its energy needs from renewables and local citizens part-own the two local wind farms. Klixbuell is now working on positioning itself as the energy ‘powerhouse’ of the North. A look at the company structure reveals that not only are local citizens investors in the wind parks but there is also foreign investment involved. The wind park is run by a GmbH & Co KG, a limited liability partnership owned by the local community who enjoy limited liability and a management company who takes a share of the profit and is fully liable. Involved in this management company is Euro Wind Energy A/S, a Danish enterprise. Setting aside for a moment the developments around intra EU investment dispute settlement, we here have a clear format where the ECT could be directly relevant to a local energy community. This business model has the advantage of enabling citizen participation and also facilitating investment. Furthermore, it is being run by a company that has specialist technological expertise resulting in innovative new technology currently being piloted to produce more efficient wind turbines, as well as developing a new energy storage hub in an old Second World War bunker. The aim is to become what the coal producing Ruhr area became for Germany after the previous energy revolution – an engine that powers Germany’s industry. Whilst the Ruhr could provide the necessary natural resource for the first fossil fuel era, before the age of oil put coal on the backburner, the northern climes of Klixbuell can offer the resources for the next energy transition – not very much sun – but copious amounts of wind and sea. From suffering years of depopulation, Klixbuell has recently bucked the trend and is seeing an increase in people moving into the area, attracted by the clean air, the proximity to the sea and the newly created opportunities economically but also in terms of quality of life and wellbeing. This corporate model shows a path away from large multinationals managing our common resources to creating a stable investment climate that enables smaller businesses working in tandem with local communities. And it also

⁷² European Federation of Renewable Energy Cooperatives (REScoop) (2023).

⁷³ Ibid, p. 28

points towards a role for investment treaties that facilitate investment and create value for local communities. It creates a possible path towards what Jeremy Rifkin termed the Third Industrial Revolution.

8 Conclusion

In his book *The Third Industrial Revolution*, Jeremy Rifkin set out a vision for a new way of doing business, one that places social capital on an equal footing with financial capital.⁷⁴ In yet, we always seem to have a tendency towards ignoring one when pursuing the other. Pitching community interest against financial interest often leads to conflict in which finance frequently has the upper hand. The energy transition will be harder to achieve and less palatable if we cannot mobilise private investment. Article 2 of the Paris Agreement 2015 obliges countries to “make finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development”.⁷⁵ If we decide that granting a central role for community energy is key to achieving the energy transition, then this is where the finance flows should go. Public funds are limited and dependent on the political will and ability to spend them. Our best option is therefore to look towards private capital to lend a helping hand. However, this will not be possible unless there is sufficient financial incentive as well as sufficient investment protection. Investing in local energy projects with citizen participation is inherently risky and requires considerable up-front costs.

On 16th April 2025, the Trump administration ordered an immediate stop to the construction of a wind farm off the coast of Long Island as part of a policy change away from renewable energy back to oil, gas and coal. The Norwegian company Equinor had acquired a lease for the site in 2017 and construction had begun in 2024.⁷⁶ Despite being a key negotiator of the ECT in the 1990s, the US never signed the treaty. The move against the wind park will therefore not result in a potential claim against the US under the ECT. However, it illustrates the dangers that investors face when the political winds change direction. Therefore, particularly in the energy sector, reassurance in the form of investor-state dispute resolution, within an investment treaty can still fulfil a useful role. There is still more research needed into how ISDS can be made a more transparent, fair and speedy judicial process and how foreign direct investment can be best embedded into the structure of a community enterprise. The provisions of the newly modernised Energy Charter Treaty, may prove to be a good starting point after all, if not as a way of keeping alive a tired old treaty of the 1990s but to formulate a more sustainable international investment framework for the next decade and beyond.

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⁷⁴ Rifkin (2011).

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⁷⁶ McGeehan (2025)

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