How Can States Best Fill the Vacuum of the Flawed Energy Charter Treaty?

Multilateralism and international law for climate-aligned, sustainable investment in a just energy transition

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A number of European Union (EU) member states took steps to withdraw[1] from the Energy Charter Treaty (ECT), the European Parliament called on the European Commission to organize a coordinated EU withdrawal[2] from the ECT combined with the neutralization of its survival clause, and the European

Commission now agrees that withdrawal is unavoidable.[3] While the vote on the proposed amendment to the ECT has been postponed to April 2023,[4] the treaty is "in life support with little chance of revival."[5]

ECT[6] "modernization" failed because it neither examined nor addressed the real determinants of energy investment with a view to phasing out fossil fuels and scaling renewable energy. Instead, the proposed amendment to the ECT preserved the traditional international investment law focus[7] on investment protection and investor–state dispute settlement (ISDS). However, as the literature has repeatedly debunked, investment protection and ISDS are neither effective nor decisive in attracting investment, including in renewable energy,[8] and can in fact be extraordinarily costly for states[9] and for broader policy objectives such as climate action.[10]

A wholly new approach is warranted.[11] To address the multifaceted challenge of building a global net-zero emission energy system, states need international cooperation tools—ranging from coordination mechanisms to soft-law guidance to international law principles to legally binding treaties—that are fit for the purposes of shaping and regulating climate-aligned energy investment, phasing out fossil energy investment, and ensuring a just transition away from fossil energy.

Advancing Climate-Aligned Energy Investment

More investment is necessary in energy efficiency, renewable electricity, climate-resilient grids, green hydrogen, and battery production and recycling, among others. To scale these investments, states should understand the determinants of energy investment. In light of that understanding, they should strategically and surgically remove the roadblocks and boost the drivers of climate-aligned energy investment.[12]

For example, states could, as appropriate, establish cooperation, financing, and capacity-building mechanisms or agree on treaty-based commitments in order to:

- Increase access to low-cost finance for climate-aligned energy investment.
- Develop ambitious regional[13] and national[14] energy roadmaps.
- Design appropriate fiscal policy tools, such as carbon pricing and support schemes.
- Streamline permitting processes for climate-aligned energy while addressing economic, social, and environmental concerns and realizing human rights.[15]
- Regulate energy investment in line with climate action.
- Build robust energy ministries and utilities.
- Strengthen domestic administrative and judicial systems[16] to take climate action and facilitate energy investment regulation and enforcement.

Phasing Out Fossil Energy Investment

Much of the renegotiation of the ECT focused on whether fossil energy companies should benefit from international investment law protection until 2030 or 2040. Instead, international negotiations should focus on adopting binding commitments, timelines, and modalities to swiftly phase out investment protections, incentives (including subsidies),[17] and public financing[18] for fossil fuels, as well as on ceasing the expansion[19] of fossil energy investments and phasing them out[20] according to a Paris-aligned pathway.[21]

To further discourage fossil energy investment as well as prevent unjust enrichment, international law could establish principles and criteria to substantially limit any compensation[22] that fossil energy companies might be paid under domestic law schemes or litigation. In addition, states could agree on principles on taxation of fossil fuel companies. Taxes on windfall profits of fossil projects that are not aligned with a net-zero pathway could be redirected to people and "countries suffering loss and damage caused by the climate crisis," as suggested by United Nations Secretary General Antonio Guterres.[23]

Ensuring a Just Energy Transition

States should enhance international cooperation on a just energy transition[24] within and between countries. They should protect the rights and meet the needs of states and people who are most vulnerable to climate and energy transition risks and costs, cannot afford to bear them, and therefore need help.

Within countries, workers[25] affected by the phase-out of fossil fuels will need protection in the form of severance packages, social safety nets, and resources and opportunities for retraining and upskilling. It will also be important to address disproportionate impacts of the energy transition on other local and Indigenous communities, and broader populations and taxpayers. Transparency, accountability,[26] stakeholder participation, just transition commissions or task forces,[27] and other procedural justice mechanisms[28] could help ensure that the voices of those affected and vulnerable are heard and their rights realized. States could cooperate, agree on principles or criteria, or provide technical and financial support for the creation of such mechanisms at the domestic level; as they may deem appropriate, they may also create subsidiary mechanisms at international level.

A just energy transition is also about global energy justice and adequate resources for all countries to invest in climate-aligned energy. Lower-income countries have the lowest levels of energy access, are the most vulnerable to climate and energy transition impacts, and have the least access to public finance, including for energy investment. Higher-income countries could establish or strengthen financial mechanisms and commitments to scale affordable finance for lower-income countries in Africa, Asia, and Latin America and the Caribbean to invest in climate-aligned energy and keep fossil fuels in the ground.

Multilateralism and International Law for Investment in a Net-Zero Energy System

Learning the lessons from the failure of the ECT and its renegotiation means that its vacuum should not be filled by another treaty designed to protect corporate privilege, along the traditional lines of the ECT, its proposed amendment, and other investment treaties. Instead, states should leverage multilateralism and develop international mechanisms that rise to the global challenges of advancing and governing investment in a just energy transition.

Universal principles on the governance of energy investment, approved by the United Nations General Assembly, could lay the foundation of a global net-zero energy system aligned with human rights and the SDGs, including universal energy access (SDG 7) and climate action (SDG 13). The principles would guide the negotiation or reform, as appropriate, of relevant binding international law instruments—such as a multilateral treaty on energy investment governance; bilateral or regional treaties on cross-border energy investments; and investment, trade, and other treaties affecting energy governance.

To achieve this vision, our team at the Columbia Center on Sustainable Investment (CCSI) continues to study and advance the SDG-oriented overhaul of international investment law and ISDS,[29] as well as to develop a framework to build cohesion among the various areas of international law that are relevant to climate-aligned investment governance.[30]

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