

## Which future of the ECT is in the best interest of the Netherlands? Position Paper

By Dr. Ruven Fleming, Assistant Professor in Energy Law, University of Groningen for the Committee Roundtable on 2 June 2022.

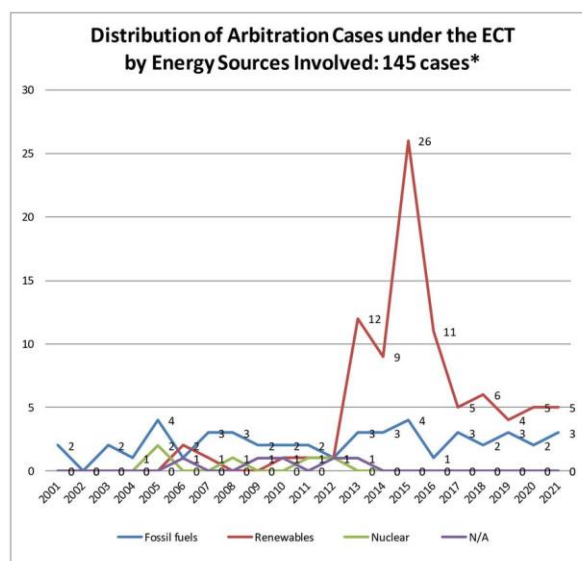
### Introduction

The modernization of the Energy Charter Treaty is a highly debated and contentious process. For the Netherlands it raises several fundamental and difficult questions. In the following position paper only the three questions posed by the committee will be addressed, due to the limited space.

### To which extend is the ECT a problem for climate policy?

The text of the ECT does not cover climate policy specifically, as this is an energy treaty. The text is neutral on the actual energy source and even **new energy carriers like hydrogen are included** in its scope. Having said that, criticism has been directed against the Investor-State Dispute Settlement Mechanism included in the ECT, as being too protective of the fossil fuels industry. The number of cases, does not really support that criticism, as most ISDS cases based on the ECT are renewable energy related cases.<sup>1</sup>

**Another important point for climate policy** is that the ECT extended particularly to the Middle East and North Africa-region to find new signatories to the Treaty but also to the International Energy Charter of 2015. **This region** will be one of the **main hubs** for 'green' and 'clean' **hydrogen** production in the future and the Netherlands will have **to import hydrogen from there. The ECT provides clear rules for this future import.** Without the ECT there would be no energy-specific general rules on the future hydrogen imports. This **example demonstrates** that the ECT can contribute to facilitating 'green' hydrogen imports and the decarbonization of gas and, thus, be **conducive to Dutch climate policies.**



Fossil Fuels		Renewables		Nuclear		N/A	
Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded	Total Damages Claimed	Total Damages Awarded
approx. EUR 12 billion + the Yukos cases (EUR 84 billion)	approx. EUR 500 million + the Yukos cases (EUR 41 billion)	approx. EUR 23 billion	approx. EUR 1.2 billion	approx. EUR 5 billion	approx. EUR 74 million	approx. EUR 543 million	approx. EUR 11 million

### Can modernisation of the treaty bring improvement, or is it better to annul the treaty?

The treaty is the only multilateral treaty specific for energy that exists in the world. Recent events surrounding the illegal war of Russia in Ukraine highlighted the extreme importance of a rules-based approach to energy. To give an example: the **transit of gas is regulated by article 7 ECT** and there is a conciliation procedure in case of conflicts. If the treaty would be annulled there would only be non-energy specific rules of international law applying to the transit of energy, such as article V WTO/GATT. **This would lead to less clear rules** on energy transit and could result in **an increased risk to security of energy supplies to the Netherlands.**

This is just one example to illustrate the issue: even if the ECT can be considered as having its shortcomings, it is better than nothing. Proponents of annulment of the treaty have not been able

<sup>1</sup> Energy Charter Secretariat Cases <https://www.energychartertreaty.org/cases/statistics/> [18/May/2022].

to put forward a mechanism that would be able to counter the ensuing legal insecurities that would follow annulment of the treaty.

### **What are the risks for the Netherlands of claims under the ECT by RWE and Uniper?**

The risks are that the Netherlands could be ruled to pay compensation to those two companies that would result from the way in which the Dutch coal phase out has been organized. Scholars pointed to the comparison with our neighbouring country Germany, where the coal phase out has been done in a different way, that better avoids the need to pay big amounts of money in compensation to foreign companies. This risk has been described e.g. in a chapter of Lolke Braaksma and me.<sup>2</sup>

As to the details: article 4 Dutch coal phase out act provides a possibility for the Minister to award financial compensation to the owner of a coal-fired power plant when it can demonstrate that it is affected **disproportionally** by the prohibition compared to the other owners. According to the Dutch government, there is no need to compensate all owners in line with article 1 First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. The argument has been that there is no disproportionality between the general interest in closing the coal-fired power plants and the interest of the owners. According to the Dutch government, the closure was foreseeable and there is a transition period and owners of newest three plants are able to earn-back their investments.

This position is not shared by the two companies and in February 2021 (RWE)<sup>3</sup> & April 2021 (Uniper)<sup>4</sup> claims were filed in front of International Centre for Settlement of Investment Disputes (ICSID) based on article 1 of the First Protocol as well as article 13 ECT, allegedly. The cases are non-public. The reason for the two companies to take that step was that the Dutch government, despite its strict stance described above, offered a maximum compensation of €512 million to RWE and €351 to Uniper for early closure of their plants, which neither company accepted. The cases are still ongoing.

In response the Netherlands initiated two anti-arbitration injunctions (one against RWE and one against Uniper) before the German courts to block the ICSID arbitrations to proceed.<sup>5</sup> The argument here has been that the arbitration agreement in the Energy Charter Treaty cannot be given effect due to the incompatibility of the Energy Charter Treaty with EU law in intra-EU investment protection matters (see Case C-741/19, Republic of Moldova v Komstroy).

In February and March 2022 the ICSID panel has voiced its 'grave concerns' about procedural aspects and the two proceedings running in parallel now, because of the anti-arbitration injunctions. It decided that the pending lawsuits in front of ICSID should be upheld and will be followed up further, despite these proceeding by the Netherlands and also rejected a request for provisional measures.<sup>6</sup> The final outcome of the proceedings cannot be reasonably predicted.

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<sup>2</sup> L Braaksma and R Fleming 'Chapter XIII - Phasing Out Coal-Fired Power Plants in the European Union: Examples from the Netherlands and Germany' (2020) in Martha Roggenkamp and Catherine Banet (eds.) *European Energy Law Report XIII* (Intersentia, Cambridge 2020) 261-286.

<sup>3</sup> ICSID Case No. ARB/21/4 available at: <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/4> [accessed 18/May/2022].

<sup>4</sup> ICSID Case No. ARB/21/22 available at: <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/22> [accessed 18/May/2022].

<sup>5</sup> Kamerbrief over start anti-arbitrageprocedures bij Duitse rechter door Staat tegen RWE en Uniper 17 May 2021 available via: <https://www.rijksoverheid.nl/documenten/kamerstukken/2021/05/17/kamerbrief-over-start-anti-arbitrageprocedures-bij-duitse-rechter-door-staat-tegen-rwe-en-uniper> [accessed 18/May/2022].

<sup>6</sup> [http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C9713/DS17319\\_En.pdf](http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C9713/DS17319_En.pdf) [accessed 18/May/2022].