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Investor-State Arbitration and the Energy Transition

By Ian Meredith and Theo Hall*

In this article, the authors explain that there is a growing contrast in appetite between states' commitments to reducing the impact of climate change on the one hand and states' commitments to investment treaty protection on the other. The authors highlight how disputes have arisen from this tension. The authors further explore recent changes in international treaties and investor-state arbitration, where states have sought to align investment protection with climate goals, such as through investment treaty reform and legal re-interpretation of existing treaties. They also discuss countervailing factors which sit uneasily with this proposed realignment, such as increased emphasis on energy security following the Russian Federation's invasion of Ukraine and other potential mismatches between short and long-term state policies, which give rise to the prospect of further disputes between states and energy investors.

The investment treaties which underpin the international system of investor-state dispute resolution are seen frequently as the progeny of the "Washington Consensus" era which dominated international economic discourse from the early 1980s until the financial crash of 2008.[1] Yet, today, there appears to be a growing contrast in appetite between states' commitments to reducing the impact of climate change and states' commitments to investment treaty protection.

The end of the Cold War ushered in an "era of proliferation" for investment treaties. Between 1990 and 2007, states signed 2,663 new investments treaties, including landmark treaties such as NAFTA (1992) and the Energy Charter Treaty (1994). By way of comparison, there were 404 investment treaties in existence in 1989 and only 410 new investment treaties have been signed since 2007.[2]

By contrast, state commitments to reducing the impact of climate change have been slower to materialise. The Intergovernmental Panel on Climate Change, a scientific body established under the auspices of the United Nations

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[1] Howse, "International Investment Law and Arbitration: A Conceptual Framework," Institute for International Law and Justice, IILJ Working Paper 2017/1 [p.15]; Sornorajah, "Resistance and Change in the International Law on Foreign Investment," Cambridge University Press (2015) [p.11]

[2] UNCTAD's Reform Package for the International Investment Regime [p.14].

with a view providing the world with a clear scientific view on the current state of knowledge regarding climate change and its potential environmental and socio-economic impacts, was not established until 1988. The first key international treaty which introduced binding gas emissions reduction targets for industrialised countries with the aim of reducing global carbon emissions, the Convention on Climate Change, was not adopted at the United Nations until May 1992. The Kyoto Protocol which introduced enhanced and legally binding emission reduction targets for developed countries, was adopted in 1997 but did not enter into force until February 2005.[3]

The Paris Agreement, adopted in December 2015 and entering into force in November 2016, was the first universal, legally-binding climate treaty. It was signed by 197 states and the European Union with the objective of maintaining the increase in global temperatures below two degrees Celsius above pre-industrial levels, whilst making efforts to limit the increase to 1.5 degrees. It represents a major development in an increasingly ambitious and rapidly developing area of international law.

The implication of such agreements is that state signatories will implement changes to energy policy which promote clean and low carbon forms of energy production and reduce reliance on traditional high-carbon forms of energy. Such agreements necessitate wide-ranging state action, often in the form of national carbon budgets and tariffs to incentivize investment in low carbon energy. These obligations sit somewhat uneasily with state obligations to encourage and protect foreign direct investments. This is principally because so many investment treaties make little or no distinction between investments which are carbon intensive and those which are not.

For example, pursuant to the terms of the UK-Hungary bilateral investment treaty (BIT) dated 9 March 1987, the signatories are obliged to "encourage and create favourable conditions for investors of the other Contracting Party to invest capital in its territory."[4] This obligation applies to investments which the treaty defined as "every kind of asset connected with economic activities."[5] To take a more prominent example, the Energy Charter Treaty (1994) defines "investment" as "every kind of asset, owned or controlled directly or indirectly

[3] European Parliament, "A Guide to Climate Change Negotiations" https://www.europarl.europa.eu/infographic/climate-negotiations-timeline/index_en.html#event-2015-12.

[4] Article 2(1), Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments, 9 March 1987 (the UK-Hungary BIT).

[5] Article 1(a), UK-Hungary BIT.

by an Investor."[6] This is wide enough to denote almost any legal right enjoyed by an investor as a result of obligations owed by a host state.[7] Put simply, under many older treaties still in place, states cannot discriminate in their treatment of investments which are carbon intensive (and therefore working against state compliance with international climate treaties) and those which are not.

TREATY REFORM

However, newer treaties have taken steps to realign states' climate policy commitments with investment protection obligations. For example, whilst the Netherlands Model BIT of 2019 adopts familiar language in relation to its definition of "investment" – "every kind of asset that has the characteristics of an investment, which includes a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk" – it incorporates much more extensive language in relation to broader state obligations:[8]

- The Preamble re-affirms the parties' commitment to "sustainable development" and the "the right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives" (which include "environmental" measures);
- Article 2 ("Scope and Application") provides that the parties retain the right to regulate in their territories to achieve "legitimate policy objectives" such as "the protection of public health" and the "environment," noting that:

  > The mere fact that a Contracting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectation of profits, is not a breach of an obligation under this Agreement.

- Under Article 3 ("Favorable conditions for investment"), the parties affirm the G20 Guiding Principles for Global Investment Policymaking (which likewise includes right to regulate investment for legitimate public policy purposes).
- Under Article 6, each party "reaffirm(s) their obligations under the multilateral agreements in the field of environmental protection . . . to

[6] Article 1(6), Annex 1 to the Final Act of the European Energy Charter Conference.

[7] Roe, Happold and Dingeman, "Settlement of Investment Disputes under the Energy Charter Treaty," page 54.

[8] Netherlands Model Investment Agreement, 22 March 2019 https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download.

which they are party, such as the Paris Agreement."

- Under Article 7, the parties reaffirm the importance of investors conducting a due diligence process to identify, prevent, mitigate and account for the environmental and social risks and impacts of its investment.

Even more radical reform has been proposed in recent years. In March 2024, the OECD hosted its 9th annual Investment Treaty Conference where delegates discussed an outright draft treaty provision which would preclude treaty claims by investors brought in relation to climate laws.[9] Other international instruments have sought to place heavier responsibilities on investors to meet climate change goals. For example, in 2023, the African Union adopted the Investment Protocol to the African Continental Free Trade Area. This includes chapters on investor obligations and environmental protection, specifically referencing the duty of investors to respect and protect the environment and to apply the "precautionary principle."[10]

States can therefore seek to rely on these sorts of provisions in future disputes relating to their right to regulate and the concomitant effect on energy investments. However, the fundamental point is that such relatively detailed drafting developments remain the exception and not the rule in the web of international investment treaties.

REINTERPRETATION OF EXISTING TREATY OBLIGATIONS

Whilst treaty reform is the most definitive way in which to clarify state obligations, a number of prominent practitioners argue that it is within the power of tribunals to interpret treaties in a way which accounts for state commitments to more recent treaties such as the Paris Agreement. The underlying criticism is that interpretation of investment treaties has been compartmentalised when, in fact, investment treaties are only a part of wider international law, which entails a broader set of obligations.

For example, the preamble to the 1994 Agreement establishing the WTO refers to "to expanding the production of and trade in services" while "seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic commitment."[11] Similarly, the 1992 UN Conference on Environment and Development committed the international commu-

[9] https://www.iisd.org/articles/policy-analysis/investor-state-dispute-settlement-fossil-fuels-carveout

[10] https://edit.wti.org/document/show/e5d51824-c467-4e24-922b-3fb376d89550

[11] Agreement Establishing the World Trade Organization, in Final Act Embodying the

nity to the objective of achieving sustainable development, requiring the integration of "all environmental, social and economic factors."[12]

Some argue that tribunals already have the power to interpret state obligations with regard to environmental issues more broadly and have simply failed to use this power.

Investment treaties are, like other international treaties, interpreted in accordance with the Vienna Convention on the Law of Treaties "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[13] However, Article 31(3)(c) provides that "there shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties."

Numerous tribunals have concluded that by consent to investment arbitration, the state signatories had agreed to apply general international law including customary international law.[14] However, there appears to have been a general reluctance in investor-state jurisprudence to refer to this article.[15] Where tribunals have referred to it, the conventional wisdom in investor-state jurisprudence is that VCLT 31(3)(c) must "[B]e taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty – or else it would amount to a general licence to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole."[16] In other words, it is to be construed narrowly.

That may not always be the case. VCLT 31(3)(c) is one of the few tools available under international law to construct a general international law by reconciling treaties and customary international law across different subject matters.[17] It has potentially generic application and may take account of the

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Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994.

[12] U.N. Conference on Environment and Development: Agenda 21, para. 10.3, U.N. Doc. A/CONF.151/4 (1992).

[13] VCLT, Article 31(1)(c).

[14] LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, Paragraph 89; ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, Paragraph 290.

[15] Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law," Yale Human Rights and Development Law Journal, Vol.1 [2014], page 95.

[16] Rosinvest v. Russia. See also Vattenfall.

[17] Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law," Yale

relationships between human rights, trade and labour, development etc. A tribunal could take account of a customary rule of international law in interpreting a treaty (although this would not involve displacing the treaty provision). The point is that there is an obligation on the Tribunal ("shall") to take account providing the customary norm is "relevant" (in some way related to the treaty norm being interpreted) and applicable (legal binding upon the parties).[18]

In interpreting investment treaties, states might argue that certain provisions of the Paris Agreement reflect customary international law on the basis that (amongst other things) there are 197 parties to the Paris Agreement representative of a range of interests in the international community and that the international community has recognised the rights of states to impose, for example, trade restrictions to achieve environmental objectives.[19] In short, tribunals might become more holistic in their interpretation of states' right to regulate in pursuit of environmental issues in a way that hitherto they have not. In this approach, tribunals would start from the premise that investment treaties are to be interpreted consistently with customary international law which is to apply unless it can be shown that to apply it would undermine the object and purpose of the investment treaty (placing the burden on the party opposing, i.e., the investor, to explain why customary international law should not apply).

Tribunals might also seek to apply Article 30 VCLT which concerns the "Application of successive treaties relating to the same subject matter." These can be applied to determine which obligations apply when two or more treaties signed at different times but which relate to the same subject matter conflict. In particular, Article 30(3) provides that:

> When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies *only to the extent that its provisions are compatible with those of the later treaty*.[20]

This codifies the principle of lex posterior, i.e., that the later treaty is to be taken to express the most recent and accurate reflection of the parties'

Human Rights and Development Law Journal, Vol.1 [2014], page 87.

[18] Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law," Yale Human Rights and Development Law Journal, Vol.1 [2014], pages 102-103.

[19] See, by analogy, Philippe Sands, "Treaty, Custom and the Cross-fertilization of International Law," Yale Human Rights and Development Law Journal, Vol.1 [2014], page 104.

[20] Emphasis added.

intentions. If the agreements do address the same subject matter and the parties are signatories of both, then only provisions of the earlier treaty will apply.

However, the meaning of "same subject matter" is likely to be a contentious one. For example, a state may argue that it is not obliged to provide investment protection under an investment treaty because it conflicts in some way with the Paris Agreement. But does the word "same" in Article mean "identical" or something broader, such as treaties with overlapping subject matters? Does "subject matter" refer to the treaty's subject, objectives or provisions? The International Law Commission (ILC) Study Group on Fragmentation recognized that the words "same subject matter" is open to interpretation.[21] Tribunals have also recognized that the determination of whether two treaties relate to the same subject matter is a "difficult theoretical question," which may not be easy in practice.[22] Nonetheless, it is perfectly possible that investor-state tribunals will begin to consider provisions such as Articles 30 and 31 in such a way that would emphasise the rights of states to regulate and withdraw protection for certain types of investments if those investments were perceived to be incompatible with the Paris Agreement.

In conclusion, more recent state practice indicates an intention to protect states' rights to regulate in order to meet international climate goals. However, there remain an overwhelming number of investment treaties which are more ambiguous about the rights of states to regulate in this way. Additionally, it is likely that states will advance increasingly innovative arguments about the interpretation of treaties under the VCLT in support of actions taken to meet international climate goals. Such arguments may resonate with some international arbitrators.

DISPUTES ARISING FROM A STATE'S ENVIRONMENTAL CONCERNS

Treaty commitments to limiting the impact of climate change have made states increasingly sensitive about the continuation for support of projects about which they have environmental concerns. Measures to address environmental concerns are often hotly disputed domestically and governments may take inconsistent approaches to such measures. To take one recent example, in April 2024, the Biden administration paused indefinitely approval for new LNG terminals on the U.S. coastline, announcing that, "This pause on new LNG

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[21] Sena Aughey, "Article 30 of the VCLT: Application of successive treaties relating to the same subject-matter" in General International Law in International Investment Law: A Commentary (Kulick, Waibel) [2024], Oxford University Press. From: General International Law in International Investment Law: A Commentary.

[22] EURAM v Slovakia (n 29) para 157.

approvals sees the climate crisis for what it is: the existential threat of our time."[23] It has also terminated the Keystone XL pipeline project (see below). At the same time, it has approved new oil and gas development projects, such as ConocoPhillips' Willow oil project in Alaska.[24]

State measures to address environmental concerns have already resulted in investors bringing claims against the host states concerned in a number of different areas:

- Cancellation of oil pipeline or LNG projects: a major example of this was the Biden administration's effective termination of the Keystone XL project (previously approved by the Trump administration in 2017), which was to transport 830,000 barrels of oil per day from Canada's Western tar sands to refineries in the United States.[25] The investors, TC Energy Corporation and Transcanada Pipelines Limited, have since initiated ICSID arbitral proceedings against the United States, using the remaining window of opportunity to bring claims under NAFTA.[26] Similarly, in *Ruby River Capital LLC v. Canada*, a US company brought a US$20 billion claim against Canada because the state had decided not to permit construction of an LNG plant following an environmental impact assessment.[27]
- Limitation of drilling licences: a recent example was the Italian government's ban on offshore oil drilling and production in Italian territorial waters.[28] Investors Rockhopper brought a claim against Italy under the ECT alleging that this ban entailed an unlawful expropriation of its investment (a drilling concession Ombrina Mare oil and gas field located off the Italian coast in the Adriatic Sea). In 2022, an arbitral tribunal agreed with the investors that Italy had unlawfully expropriated its investment, awarding Rockhopper entities EUR 190

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[23] https://www.ft.com/content/60d7ead0-e770-4bc5-826c-a2b8c704a446.

[24] https://edition.cnn.com/2023/03/14/politics/willow-project-oil-alaska-explained-climate/index.html.

[25] https://www.cnbc.com/2021/06/09/tc-energy-terminates-keystone-xl-pipeline-project.html#:~:text=Keystone%20pipeline%20officially%20canceled%20after%20Biden%20revokes%20key%20permit&text=Keystone%20XL%20was%20halted%20by,of%20the%201%2C200%2Dmile%20project.

[26] The tribunal dismissed the claim on jurisdictional grounds in July 2024, https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C10297/DS19910_En.pdf. https://www.italaw.com/cases/9339.

[27] https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C11097/DS18460_En.pdf.

[28] K&L Gates provided legal advice to the Italian state on this dispute.

million.[29]

- The phase-out of coal power: in 2021, the Netherlands adopted the Climate Act which specifically sought to align Dutch government policy with the Paris Agreement,[30] introduced a phased ban of the use of coal to generate electricity. German utility company, RWE, owned two coal power plants in the Netherlands which were affected by this phase-out.[31] RWE brought proceedings under the Energy Charter Treaty alleging inter alia that the Netherlands had indirectly expropriated its investments and had breached the FET and FPS provisions of the ECT.[32] Another German utility company, Uniper, filed a claim against the Netherlands pursuant to the ECT in relation to the same measures.[33]
- The phase-out of oil and gas fields: following a series of earth tremors and an earthquake in 2018, the Netherlands accelerated a phase-out of production at the Groningen gas field by 2024. Shell and ExxonMobil, who have operated a joint venture at the gas field since 1963, recently launched a contractual arbitration against the Netherlands in relation to this closure.[34] Exxon has also recently announced that it has brought a claim against the Netherlands under the Energy Charter Treaty.[35] The Republic of Ireland is facing its first ever treaty claim from a UK investor after it declined to grant a lease to develop the Barryroe offshore oil and gas field located in the North Sea Celtic Basin.[36]

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[29] https://rockhopperexploration.co.uk/2023/12/monetisation-of-arbitration-award/#:~:text=As%20announced%20on%2024%20August,2016%20until%20time%20of%20payment.

[30] Sections A and B3, Netherlands Climate Agreement, 28 June 2019 https://www.klimaatakkoord.nl/documenten/publicaties/2019/06/28/national-climate-agreement-the-netherlands.

[31] https://globalarbitrationreview.com/article/netherlands-faces-first-icsid-claim-over-coal-plant-ban.

[32] RWE AG and RWE Eemshaven Holding II BV v. The Kingdom of the Netherlands, Request for Arbitration, 20 January 2021, paragraph 15, https://www.italaw.com/sites/default/files/case-documents/italaw170469.pdf.

[33] Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. The Kingdom of the Netherlands https://www.italaw.com/sites/default/files/case-documents/italaw170449.pdf.

[34] https://globalarbitrationreview.com/article/shell-and-exxon-launch-claim-over-phase-out-of-dutch-gas-field.

[35] https://globalarbitrationreview.com/article/exxon-brings-ect-claim-against-netherlands-over-gas-phase-out

[36] https://globalarbitrationreview.com/article/uk-oil-company-instructs-counsel-claim-against-ireland.

- The phase-out of nuclear power: following the German government's decision in 2011 to phase out nuclear energy production in Germany,[37] Sweden's state-run power company, Vattenfall, which had a stake in two reactors located in Germany, initiated arbitration proceedings against Germany.[38]
- The cancellation of mining projects: in April 2021, the Spanish government passed amendments to its domestic climate change and energy transition legislation which included a ban on extracting radioactive materials such as uranium – and closure of any open proceedings related to the authorisation of radioactive facilities. An Australian mining investor, Berkeley Energia, has announced it will pursue ICSID proceedings against Spain for breach of the ECT.[39]

There is a distinct likelihood that states will incur significant costs in addressing environmental concerns and / or transitioning their economies away from reliance on fossil fuels. These claims typically hinge around alleged breaches of "fair and equitable treatment" provisions in investment treaties and allegations of expropriation of property (whether by direct government fiat or by "creeping expropriation"). In September 2022, UNCTAD estimated that investors had brought 175 treaty claims against states in relation to environmental laws.[40] Another recent study estimated that the cost of such a transition to states might entail investor claims of US$340 million.[41] Such measures will continue to be a source of investment disputes in the future.

DISPUTES ARISING FROM GREEN TRANSITION POLICIES

Whilst states have in many cases been reticent to support continued growth in carbon-heavy industries, they have often shied away from the cost of policies designed to incentivise private sector investment in transition energy, which entail significant public expenditure.

For example, in Auction Round 5 ("AR5") of the UK Government's Contracts for Contracts for Difference in the offshore wind sector at the end of 2023, whereby the UK Government invited companies to develop offshore

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[37] https://www.base.bund.de/EN/ns/nuclear-phase-out/nuclear-phase-out_node.html#:~:text=The%20last%20three%20nuclear%20power%20plants%20in%20Germany%20were%20shut,April%202023%20at%20the%20latest.

[38] Vattenfall AB and others v Federal Republic of Germany (ICSID Case no ARB/12/12) https://globalarbitrationreview.com/article/vattenfall-launches-second-claim-against-germany.

[39] https://globalarbitrationreview.com/article/uranium-miner-brings-ect-claim-against-spain.

[40] https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf.

[41] https://globalarbitrationreview.com/article/study-finds-green-transition-could-prompt-us340-billion-in-isds-claims.

wind projects for supply of electricity into the UK grid in exchange for a guaranteed, or strike, price based on the amount of electricity generated), no bids were received for offshore wind developments. This was attributed in large part to the low strike price.[42]

Similarly, in US offshore wind developments, Avangrid, owned by a Spanish energy company, had agreed to a contract with Connecticut's Department of Energy and Environmental Protection to build an 804-megawatt offshore wind project in 2019. In 2022, it attempted to renegotiate the price per megawatt due to inflation and supply chain issues but Connecticut state officials would not renegotiate the contract. On October 3, Avangrid announced its cancellation of the project.[43] Other developers have also pulled out of a number of US wind projects because of supply chain issues which would have eroded the profitability of the projects.

The point is that, in order to guarantee private investment and the unimpeded development of energy transition projects, states need to ensure that the offer to private investors is sufficiently generous.

By contrast, a number of countries in the European Union have in recent years, sought to reduce or resile from previous renewable energy tariff arrangements in an effort to reduce supply or state expenditure.

In August 2010, the Italian government announced its "Conto Energia III" which set out the Italian government's feed-in tariff regime for photovoltaic solar energy plants which commenced operation between 2011 and 2013 for a period of 20 years.[44] In May 2011, the Italian government announced Conto Energia IV, which established a gradual reduction of the incentivizing tariffs available for photovoltaic plants entering into operation after 31 May 2011, with plants entering into operation in June 2011 receiving a higher incentive than those entering into operation in March 2012. This and subsequent amendments to the regime prompted a number of arbitrations under the Energy Charter Treaty from investors in the photovoltaic sector, who alleged that their investments had been rendered economically unviable as a result of reduced tariff levels.[45]

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[42] https://www.woodmac.com/news/opinion/net-zero-offshore-wind-bids-in-uks-latest-tender/.

[43] https://eu.usatoday.com/story/money/2023/11/01/orsted-offshore-wind-nj/71404989007/.

[44] https://www.lexology.com/library/detail.aspx?g=2e392b68-c582-4a3d-b1e3-4a2ddea135d1.

[45] Eskosol SpA in Liquidazione v. The Italian Republic, ICSID Case No. ARB/15/50;

A further prominent example was Spain's reduction of feed-in tariffs for solar energy production. In 2007, Spain had introduced regulatory measures to incentivise private investment in renewable energy. The opportunity to invest in Spain was widely taken up by foreign investors. In 2010, following the financial crisis in 2008, the Spanish government implemented numerous changes to its regulations.[46] It amended feed-in tariff rates, limited feed-in tariffs to a certain number of hours per year and imposed new taxes on energy transferred to Spain's national grid. In 2013, the feed-in tariffs were abolished and replaced with a supplemental payment to investors to cover investment costs which could not be covered through the sale of electricity.[47] As a result of these changes, investors have initiated around 50 arbitrations against Spain[48] and Spain has incurred liabilities of EUR 8 billion to investors as a result.[49]

It is worth noting that during the period when Spain and Italy enacted measures to cut back on the scope of its incentives to private investors, both countries were under acute fiscal strain following the financial crash of 2008 and under pressure from the EU to enact austerity measures to restrict and reduce public expenditure.

The Czech Republic has also faced arbitrations in similar circumstances.[50] It had introduced measures to incentivise investment into renewable energy, such as corporate tax holidays, accelerated depreciation periods for tax purposes on solar installations, preferential treatment for renewable energy producers and legal guarantees that feed-in tariffs would not decrease by more than 5% per annum.[51] It later introduced amendments to these measures to the detriment of investors by repealing tax holidays and accelerated depreciation periods,

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Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. The Italian Republic, ICSID Case No. ARB/14/3; ESPF Beteiligungs GmbH, ESPF N2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GMbH & Co. KG v. The Italian Republic (ICSID Case No. ARB/16/5), Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, CEF Energia BV v. Italian Republic, SCC Case No. 158/2015, Encavis AG and others v. Italian Republic (ICSID Case No. ARB/20/39), Suntech Power International Ltd. v. Italian Republic (ICSID Case No. ARB/23/14).

[46] https://www.tni.org/files/publication-downloads/english_from_solar_dream_to_legal_nightmare_online.pdf.

[47] See The PV Investors v Spain, PCA Case No. 2012-14, paragraphs 182 to 217.

[48] https://www.iisd.org/itn/en/2019/06/27/spains-renewable-energy-saga-lessons-for-international-investment-law-and-sustainable-development-isabella-reynoso/.

[49] https://www.euronews.com/my-europe/2022/12/27/spain-faces-8-billion-in-renewable-legal-claims-over-past-solar-boom.

[50] https://globalarbitrationreview.com/article/czech-republic-ordered-pay-over-solar-measures.

[51] See Voltaic Network v Czechia, PCA Case No. 2014-20, paragraphs 130 to 149.

introducing new levies on solar plants and abolishing feed-in tariffs from 2013 onwards.[52]

In conclusion, green transition policies and the innovations they engender, such as tariffs, carbon credits and green certificates schemes, are likely to be sources of disputes between investors and states in the future.

THE TENSION BETWEEN SHORT AND LONG-TERM GOALS

The issue for states as key stakeholders in energy transition projects is evident from the cases above. The energy transition often involves the creation of new markets and the need for private investment. If states wish to incentivise private investment in these projects, they must offer a price which enables investors to make a sufficient profit to induce the investment. However, the calculation of this price is not straightforward, and states have found themselves in positions where they have overstimulated investment in transition projects and are faced with an unacceptably high bill. States are obliged to apply the Benthamite calculus in balancing long-term obligations (such as those under the Paris Agreement), with shorter-term pressures (such as fiscal policy). Viewed through this prism, investment disputes arising out of energy transition measures usually arise because of tensions between short and long-term government policy.

A further example illustrates this tension. On 24 February 2022, the Russian Federation invaded Ukraine. Europe's reliance on Russian gas imports had been highlighted for many years previous to the Russian invasion.[53] In 2021, the Russian Federation was the top supplier of gas to the EU with a 45% share of pipeline gas imports into the EU.[54] By the end of 2023, the EU had pivoted sharply away from supplies of Russian oil and gas such that trade in energy products between Russia and the European Union has "largely disappeared."[55]

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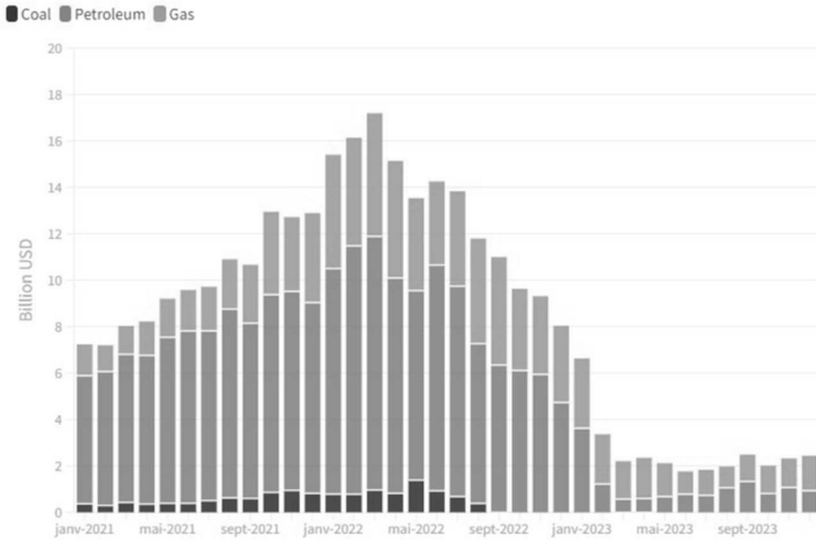
[52] See Voltaic Network v Czechia, PCA Case No. 2014-20, paragraphs 157 to 182.

[53] https://www.marshallcenter.org/en/publications/occasional-papers/europes-dependence-russian-natural-gas-perspectives-and-recommendations-long-term-strategy-0#toc-chapter-2-gazprom-and-the-russian-strategy; https://www.reuters.com/article/idUSKBN1K10VH/#:~:text=BRUSSELS%20(Reuters)%20%2D%20U.S.%20President,to%20raise%20defense%20spending%20more.

[54] European Commission, Quarterly Report on European Gas Markets, Q1 2021, page 4.

[55] https://www.bruegel.org/analysis/european-union-russia-energy-divorce-state-play.

Figure 1: Russian energy exports to the EU, $ billions, Jan 2021 – Dec 2023



Source: Bruegel (Darvas et al, 2022).

In place of Russian oil and gas, Europe increased imports of LNG from the US and Qatar, and increased importation of pipeline gas from, amongst others, Norway and North Africa.[56] Norway issued 47 new oil and gas permits in 2023 to ensure that "Norway remains a safe and predictable supplier of oil and gas to Europe."[57] The UK has issued 24 new oil and gas licences in the North Sea. These measures were largely based on the very real short-term security concerns. The then Energy Security Secretary Grant Shapps stated in July 2023 that:

> In the wake of Putin's barbaric invasion of Ukraine, our energy security is more important than ever. The North Sea is at the heart of our plan to power up Britain from Britain so that tyrants like Putin can never again use energy as a weapon to blackmail us.[58]

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[56] European Commission, Quarterly Report on European Gas Markets (Q3, 2023), page 11. https://energy.ec.europa.eu/document/download/64002c8c-5961-4ef2-a576-80ad135fbdde_en?filename=New_Quarterly_Report_on_European_Gas_Markets_Q3_2023.pdf.

[57] https://uk.movies.yahoo.com/movies/norway-awards-47-oil-gas-124422865.html?guccounter=1.

[58] https://www.gov.uk/government/news/hundreds-of-new-north-sea-oil-and-gas-licences-to-boost-british-energy-independence-and-grow-the-economy-31-july-2023.

Increased domestic production of oil and gas, even if replacing drastically reduced Russian supply, has been widely criticised on environmental grounds and is seemingly at odds with state obligations under the Paris Agreement.[59] The new Labour government in the UK, which took power in May 2024, had previously cast doubts on whether it would permit new drilling licences in the North Sea when in government.[60] That is not to say that it will cancel these licences. However, if they did, the UK would not be the first state to offer and retract in a short period of time.

CONCLUSION

The actions which states must take in order to implement their obligations under the Paris Agreement implicates the interests of, amongst others, carbon heavy industries, whose business activities are ill-at-ease with the goals of the Paris Agreement. This may result in states having to break investment treaty obligations in order to meet Paris Agreement obligations which could in turn result in a wave of compensation becoming due to investors.

States have begun to reconsider treaty obligations in light of this prospect. States have developed new model investment treaties which protect states by emphasising the "right to regulate" in order to protect the environment. There have been attempts to modernise existing treaties. For example, ECT modernisation agenda might have addressed environmental concerns but states have been unable to find consensus. This has resulted in large scale withdrawal.

The Paris Agreement entails to the fulfilment of long-term goals. These long-term goals may be blown off course by short term economic and geopolitical pressures, or by disagreements between political parties at the domestic level. Investor claims are likely to arrive where this tension manifests itself in policy flip-flopping which unduly impacts' investors' investments in the host state's energy sector.

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[59] https://www.theguardian.com/business/2024/jan/31/grossly-irresponsible-uk-hands-out-24-new-north-sea-oil-and-gas-licences; https://www.bbc.co.uk/news/science-environment-63163824.

[60] https://ukerc.ac.uk/news/keir-starmer-hasnt-really-called-time-on-north-sea-oil-and-gas-heres-why/.