

---

# Energy Charter Treaty: Why exiting the ECT is so important



2. November 2022

Fabian Flues  
PowerShift e.V.

[Fabian.flues@power-shift.de](mailto:Fabian.flues@power-shift.de)

# Outline

---

1. Distributing costs of the energy transition
2. Renewables and the ECT
3. ECT reform
  - Expansion to new energy sources
  - Expansion to the Global South
4. Outlook

# Winners & losers of the energy transition

---

Stranding of fossil fuel assets:

- ❓ How are the costs/losses distributed between asset owners and the public?
- ❓ Who decides on the distribution?

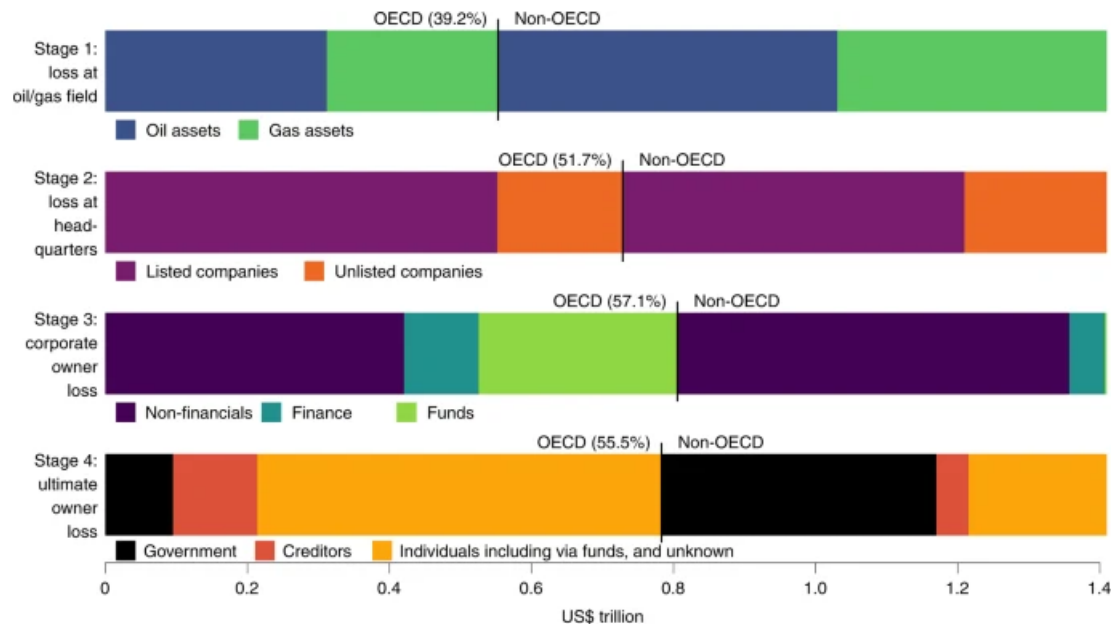
For renewable investments:

- ❓ Who should receive particular public support?



# Stranded assets

**Fig. 2: Ownership chain of stranded assets by OECD/non-OECD geography and major institutional categories.**



Each bar represents **\$1.4 trillion** in losses from medium expectations realignment at successive ownership stages, divided into OECD and non-OECD losses, and within each geography into major institutional categories.

# Coal exits & Energy Charter Treaty

---

## Dutch coal exit

Decided by parliament & government

RWE & Uniper threaten & file ECT claim

Netherlands sued for €2.4 billion

## German coal exit

Negotiated exit between government & coal companies

Companies waive ECT claims and receive €4.35 billion in return

Europäische Commission challenges compensation (state aid)

**Teuer erkauft:  
Wie der Energiecharta-  
Vertrag die Kosten  
des deutschen  
Braunkohleausstiegs  
in die Höhe trieb**



# German coal exit

---

E-Mail BMWi an BKAm, 31. Oktober 2019, 21:32 Uhr,

Anhang: Bewertung Kohleausstieg durch Ordnungsrecht

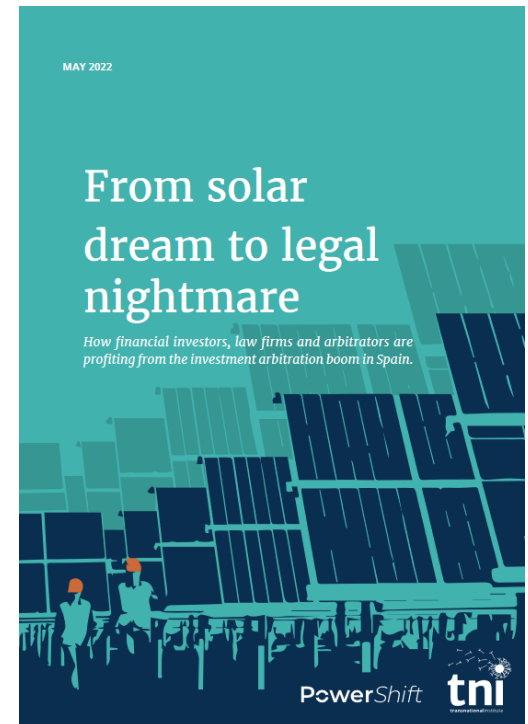
Auszüge aus diesem Anhang mit Bezug zum Energiecharta-Vertrag:

5. Erhöhtes Klagerisiko, insb. völkerrechtliche Klagerisiken nach Energy Charta Treaty (ECT)

Insgesamt dürfte die Einführung von Ordnungsrecht das Klagerisiko erhöhen. Es ist insbesondere zu erwarten, dass die Unternehmen neben dem nationalen Rechtsweg auch internationale Schiedsgerichtsverfahren anstreben werden, soweit das Gesetz ordnungsrechtliche Maßnahmen vorsieht. Diese Verfahren sind zeit- und kostenintensiv. Derzeit halten mehrere Unternehmen mit einem Sitz außerhalb Deutschlands mehrheitlich oder anteilige Eigentumsanteile an Steinkohlekraftwerken mit Standort in Deutschland. Dies betrifft beispielsweise die Unternehmen Uniper (3 GW), Vattenfall (insg. 2,8 GW), Riverstone (1,6 GW), EPH (0,7 GW). Uniper hat bereits angekündigt ein internationales Schiedsgerichtsverfahren gegen das niederländische Kohleausstiegsgesetz anzustreben.


# ECT for Renewables?

- Many ECT cases in the renewables sector, but
  - No evidence that ECT (or other investment treaties) increase investment in renewables
  - ECT allows renewables investors lock-in high profits
  - Discriminates against local/domestic investors
  - Most ECT cases by financial firms and investment funds



European Renewable Energies Federation  
@EREFEU

...

EREF calls on EU & Member States to join  and withdraw from the Energy Charter Treaty. The so-called "agreement in principle" sustains Europe's fossil dependency & prevents transitioning to 100% [#renewableenergy](#) - read our press release here:

# Effects of renewable arbitrations

---



Prof. Philippe Sands

reliance upon such an expectation, is a matter of considerable concern. The Majority has treated the ECT rules on FET as being akin to a modest insurance mechanism, one that allows the Claimants to benefit from a regulatory framework that was widely seen to be generous in creating windfall profits in the face of an unprecedented economic crisis and historically low rates of interest.<sup>43</sup>

change. By making certain technologies more expensive than they need be, the approach offers support for those who see the ECT as setting out obsolescent rules that reflect a bygone era, a legal carbuncle negotiated in an earlier age that will limit efforts truly to transform energy supply systems and offer protections to our common environment.<sup>46</sup>



# Main problems of the ECT reform

---

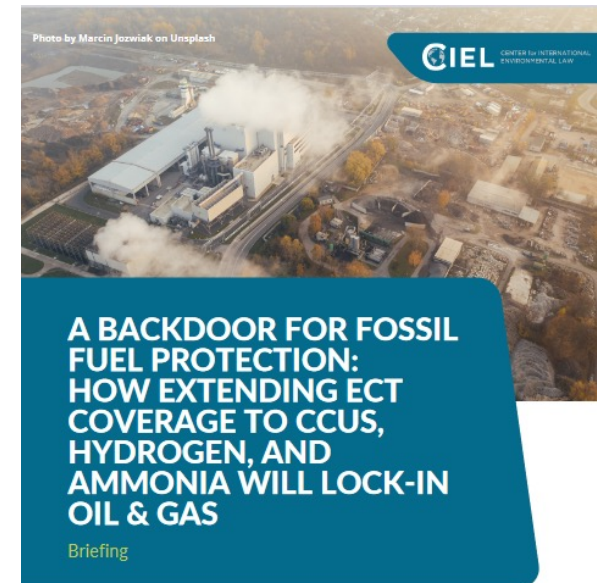
1. Existing fossil fuel investments protected for at least 10 more years (not Paris-compatible)
  - Nuclear energy protected indefinitely
  - Some gas investments protected until 2040
2. ISDS mechanism remains unreformed
3. Protection standards too far-reaching (against German coalition agreement)
4. Expansion to new energy sources & technologies
5. Planned expansion to the Global South



# Expansion to new energy sources

---

- Hydrogen, biogas, biomass + carbon capture & storage
  - Not clean as such
- New technologies particularly vulnerable to ISDS claims
  - Often need initial government support
  - Uncertain cost development
- Not needed for the roll-out of new technologies

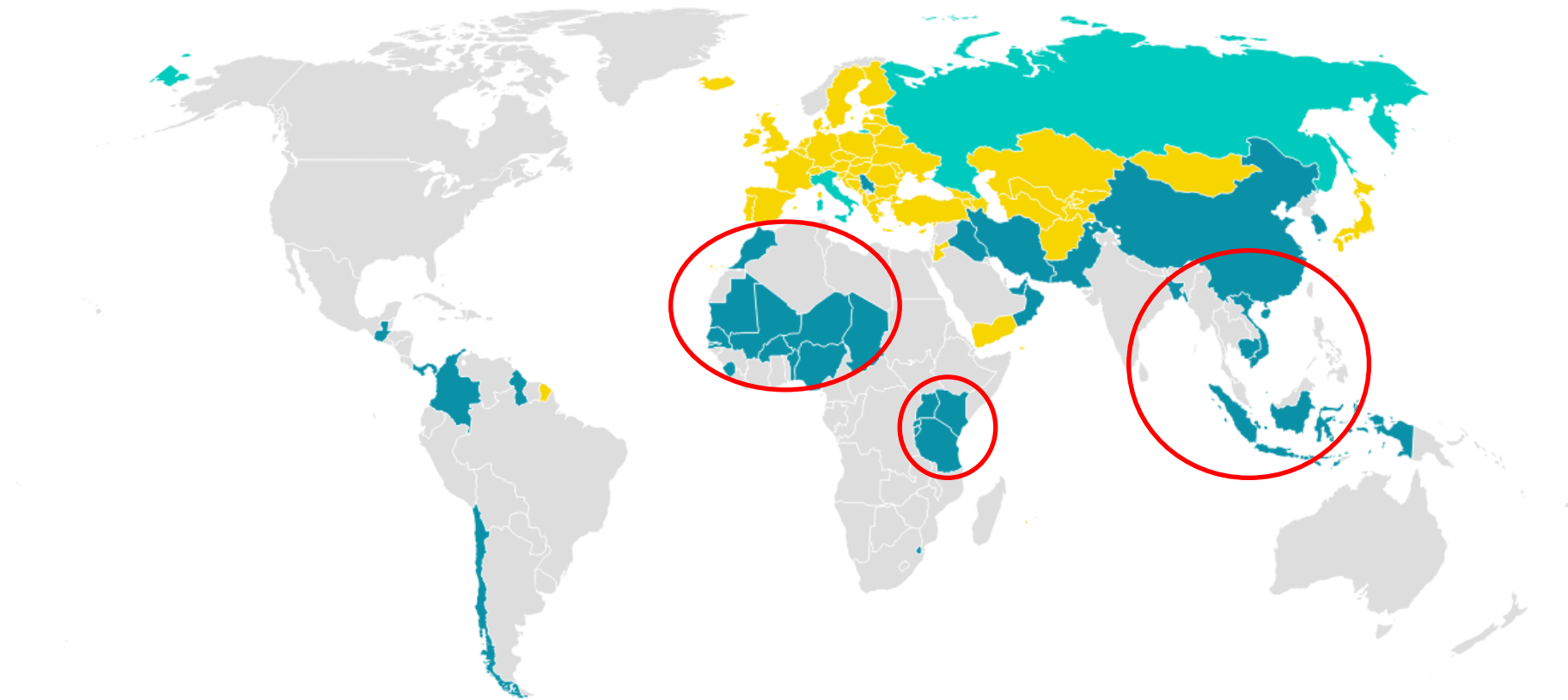


Extending protection under the Energy Charter Treaty (ECT) to investments in carbon capture, utilization and storage, hydrogen, and ammonia, among other emerging energy technologies and products, could hamper the ability of States to end reliance on fossil fuels. It could also discourage States from adequately regulating technological responses to climate change that risk harming human rights and the environment. This briefing explains why.

October, 2022

# ECT Expansion

Full ECT member   Candidate to join the ECT   Left the ECT



Created with Datawrapper

# Outlook: Energy Charter Treaty

- 5 European governments announced withdrawal
- **Germany** is the most important hold-out
  - <https://power-shift.de/exit-ect/>
  - <https://caneurope.org/exitect/>
- Important for the EU to withdraw as well!
- Will the ECT survive?



# Outlook: Beyond the ECT

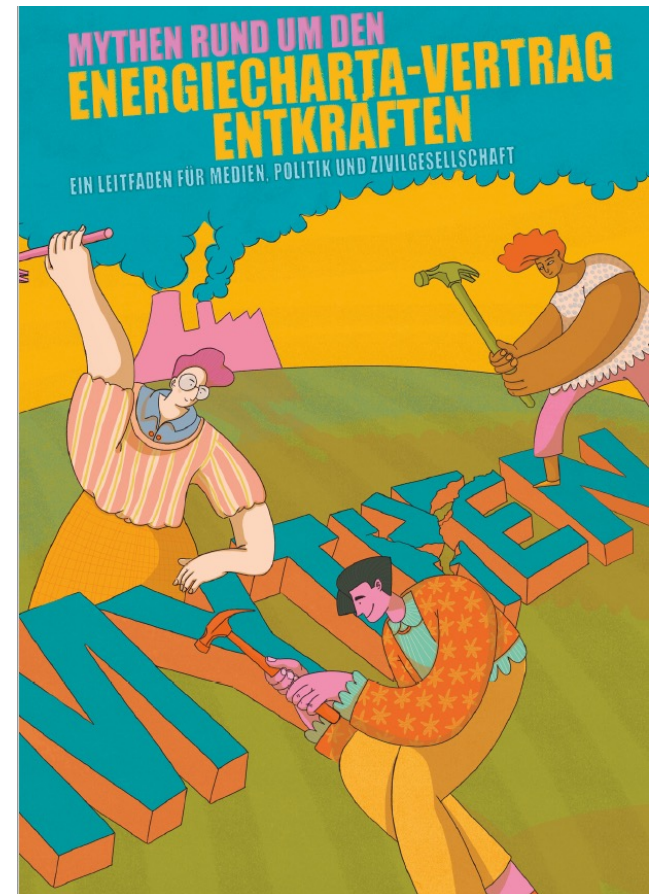
- Use momentum of ECT exits!
- Minimum: No more protection of fossil fuels
  - V. good European Parliament position
  - But: CETA, EU-Mexico & other agreements
  - But: Sunset clauses still included
- 2500+ investment treaties
  - But: Few treaties used in most cases
  - Some governments ending investment treaties (USA, South Africa, Indonesia)
- Can we find a global solution?





# Further Information

- Website about Energy Charter Treaty (DE, EN):  
<https://energy-charter-dirty-secrets.org/de/>
- Assessment of the ECT reform (DE, EN):  
<https://power-shift.de/die-reform-des-energiecharta-vetrags-laesst-klimakiller-weiterleben/>
- Report: Renewable cases against Spain (EN):  
<https://power-shift.de/energy-charter-treaty-in-spain-from-solar-dream-to-legal-nightmare/>
- Argumentation Guide ECT (DE, EN):  
<https://power-shift.de/mythen-rund-um-den-energiecharta-vertrag-entkraeffen/>
- Report: German coal exit and the ECT (DE, EN):  
<https://power-shift.de/ect-erhoeht-kosten-kohleausstieg/>
- Report: New energy sources & ECT (EN):  
[https://www.ciel.org/wp-content/uploads/2022/10/October-2022\\_CIEL\\_Briefing\\_A-Backdoor-for-Fossil-CIEL\\_brief\\_Fuel-Protection-How-Extending-ECT-Coverage-to-CCUS-Hydrogen-and-Ammonia-will-Lock-In-Oil-Gas-Oct-2022.pdf](https://www.ciel.org/wp-content/uploads/2022/10/October-2022_CIEL_Briefing_A-Backdoor-for-Fossil-CIEL_brief_Fuel-Protection-How-Extending-ECT-Coverage-to-CCUS-Hydrogen-and-Ammonia-will-Lock-In-Oil-Gas-Oct-2022.pdf)



---

Thank you for your attention!

Question or comments?  
[fabian.flues@power-shift.de](mailto:fabian.flues@power-shift.de)

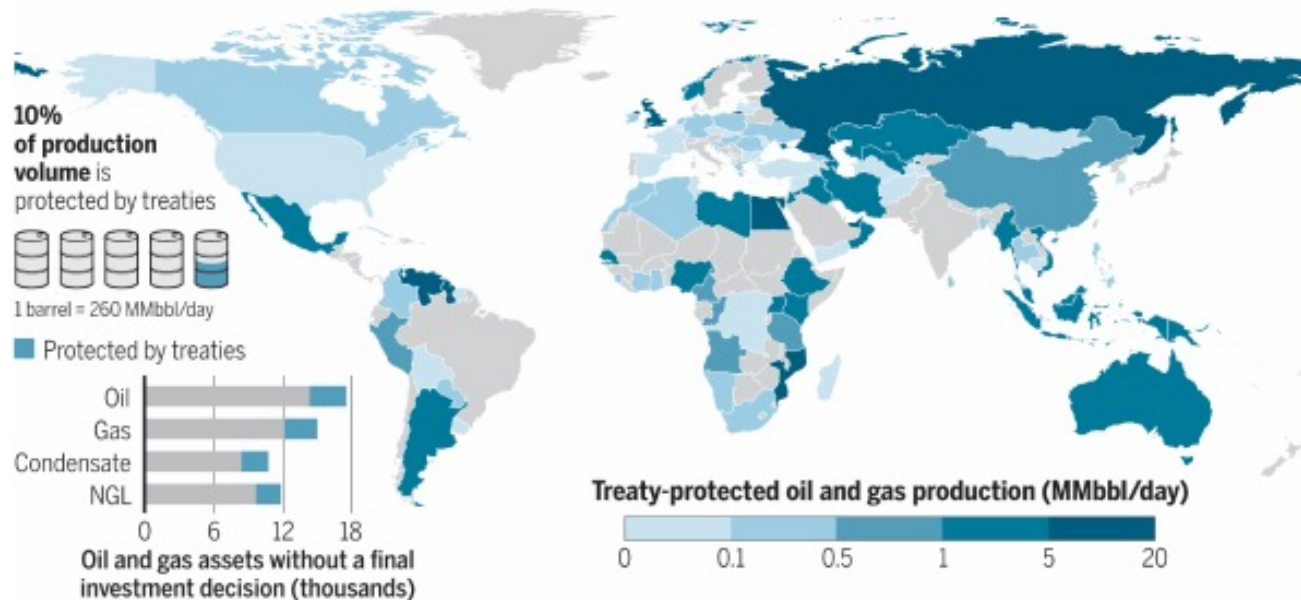
|   | Future foreign investments in the EU - after 2023  |                                       | Existing foreign investments in the EU - before 2023                               |  | Future EU investments in other contracting parties               |                                       | Existing EU investments in other contracting parties           |                                       |
|---|--|---------------------------------------|--|--|--|---------------------------------------|--|---------------------------------------|
|   | REFORMED ECT   | EU WITHDRAWAL - ABOLISH SUNSET CLAUSE | REFORMED ECT   | EU WITHDRAWAL - ABOLISH SUNSET CLAUSE  | REFORMED ECT   | EU WITHDRAWAL - ABOLISH SUNSET CLAUSE | REFORMED ECT   | EU WITHDRAWAL - ABOLISH SUNSET CLAUSE |
| COAL & OIL  | Not protected  | Not protected                         | Lose protection 10 years after the entry into force (i.e. at the earliest in 2034) | Protected until 2043 (in relation to contracting parties that remain in the ECT) | Protected indefinitely (except in Japan, Turkey and Switzerland) | Not protected                         | Protected indefinitely (except in Japan, Turkey & Switzerland) | Protected until 2043                  |
| GAS   | Some gas assets (power plants, infrastructure and pipelines) protected until 2040  | Not protected                         | Lose protection 10 years after the entry into force (i.e. at the earliest in 2034) | Protected until 2043 (in relation to contracting parties that remain in the ECT) | Protected indefinitely   | Not protected                         | Protected indefinitely   | Protected until 2043                  |
| HYDROGEN & NEWLY ADDED MATERIALS, PRODUCTS & TECHNOLOGIES | Protected indefinitely<br><br>*Biomass, Biogas, 'Low carbon' (derived from gas fired and nuclear power plants) and renewable hydrogen, 'low carbon' synthetic fuels, Ammonia, Methanol | Not protected                         | List of materials protected indefinitely   | Protected until 2043 (in relation to contracting parties that remain in the ECT) | Protected indefinitely   | Not protected                         | Protected indefinitely   | Not protected                         |



# Future oil & gas projects

## Treaty-protected fossil fuel projects could delay climate action

(Top) Extent of the world's oil and gas projects without a final investment decision that are protected by foreign investment treaties, and their estimated production volume in millions of barrels per day (MMbbl/day). (Bottom) Estimated total net present value (NPV) of all treaty-protected oil and gas projects without a final investment decision across four oil price scenarios, including the average total NPV per country across all scenarios, and the share of the valuation protected exclusively by the Energy Charter Treaty.



# Investor-state dispute settlement (ISDS)



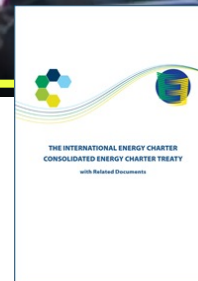
Sues based on an investment treaty

Pays compensation

**VATTENFALL**



3 arbitrators decide on the basis  
of an investment treaty



# Why ISDS cases are so dangerous

---

- Cases can be kept completely secret
- Vague and wide definition of „property rights“
- „Future profits“ are usually compensated
- Hardly any possibility to appeal
- Decisions can be enforced world-wide
- Cases often used as a tool to pressure governments