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Supervisor: Dr. Jelena Belic

Second Reader: Dr. Rebecca Ploof

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Climate Responsibilities: Should the EU leave the Energy Charter Treaty that allows for investor-state dispute settlement?

Eva Fritz

S3134555

Contents

Abstract

This bachelor thesis undertakes a normative analysis of the Energy Charter Treaty (ECT) within the framework of climate distributive justice and focuses on the European Union's position. The research reveals a misalignment between the current provisions of the ECT and climate distributive principles. Corporations are granted significant autonomy for self-regulation through Corporate Social Responsibility (CSR) in the current climate regime, which leads to unjust distributions of climate burdens. Through an in-depth examination of the text of the treaty this thesis proposes a formal regulatory approach that emphasizes states' legislative responsibility. This approach aims to bridge the gap between current ECT provisions and climate distributive justice imperatives, ensuring a more equitable distribution of climate burdens among corporations and state actors. The thesis outlines a strategic pathway for the EU to address these issues, emphasizing the necessity for an amendment of the ECT. The proposed amendments call for a re-evaluation of the treaty's provisions to align with climate distributive justice principles and hold states accountable for more rigorous legislative measures. The analysis further concludes that, given the urgency of climate action, the EU should expedite its departure from the ECT if the proposed amendments are not implemented. By advocating for a comprehensive re-evaluation and amendment of the ECT, this research contributes to the discourse on climate distributive justice. The proposed changes seek to ensure that international energy agreements adhere to distributive justice principles, promoting a more equitable global climate regime.

A) Introduction

Undeniably, climate change poses a growing threat to earth and humanity. The latest synthesis report from 2023 of the Intergovernmental Panel on Climate Change (IPCC) is alarming. It states that "human activities, principally through emissions of greenhouse gases, have unequivocally caused global warming […]" (IPCC, 2023, p. 4, A. 1). The biggest contribution to greenhouse gas (GHG) emissions come from fossil fuel combustion and industrial processes (IPCC, 2023, p. 4, A.1.4.). The report estimates with high confidence that 79% of global GHG emissions in 2019 came from the energy, industry, transport, and buildings sectors (IPCC, 2023, p. 4, A.1.4.). GHG emissions lead to weather and climate extremes everywhere on the planet (IPCC, 2023, p. 5, A.2). Regions and people suffering disproportionately, are located in the Global South (IPCC, 2023, p. 4; Posner & Weisbach, 2010, pp. 39-40). During floods in 2022, for example, approximately one-third of Pakistan's landmass was submerged, leading to the displacement of millions from their homes (International Peace Institute Global Observatory, 2023).

Furthermore, there is a "rapidly narrowing window of opportunity" for climate mitigation (IPCC, 2023, p. 24, C.1). This implies a need for global, rapid, and systemic transformation throughout economy and society (UNEP, 2022, p. IV). The most recent closing agreement from the COP28 on December 13, 2023, emphasizes again the urgency of a rapid, fair, and equitable transition, supported by substantial reductions in emissions and increased financial support (United Nations Climate Change, 2023).The global efforts to address the climate crisis so far, have primarily been facilitated through two key initiatives: the United Nations Framework Convention on Climate Change (UNFCCC) established in 1992, and recognized as the first universal and legally binding global climate agreement and the Paris Agreement of 2015. Nevertheless, there has also been criticism for its inability to achieve a significant reduction in GHG emissions (e.g., Dryzek, 2016, p. 533). To reach climate goals that arise out of the Paris Agreement, clear (inter-)national policies have to be formulated and implemented. One example for that is the European Green Deal (EGD) from 2019, a European policy with the main goal of reducing GHG emissions to a net zero by 2050 (European Commission, 2019, 2.1.1.).

While the EGD was widely well perceived as a sign of the EU's commitment to combat climate change, a contrasting dynamic emerges with certain other international agreements. Specifically the Energy Charter Treaty of 1994 (ECT), designed to safeguard investments in the energy production sector seems contradictory to those goals. It stands out as the most frequently invoked international treaty in disputes between energy production investors and

host states (International Energy Charter, 2020). This arises because the ECT incorporates an Investor-State Dispute Settlement (ISDS) system relying on arbitration procedures, conducted outside courts. Consequently to those procedures, host states were and are obligated to pay substantial compensation sums to investors in cases where changes to environmental laws or policies limiting the energy production based on fossil fuels were made (Braun, 2021). The ECT and its ISDS mechanism cause tensions within states wanting to fulfil their obligations from the Paris Agreement and the EGD, but fear to do so because they might face litigation and compensation claims from the corporations they are trying to restrict (Climate Action Network Europe, 2021). This raises questions of climate distributive justice. Is it a fair distribution of climate burdens when states bear substantial financial burdens by compensating private companies, who are major contributors to the climate crisis? At stake are nothing less than urgently needed climate mitigation measures concerning the energy production sector, that need to follow the guidelines of the Paris Agreement and the EGD. With the ECT in place it is not likely that the main goals of either can be reached. While existing research on climate distributive justice primarily concentrates on applying distributive justice principles to climate policy strategies, it has neglected the application to international treaties, which can have effects on the equitable distribution of the burdens of climate change mitigation and adaptation too.

I therefore pose the question: Should the EU leave the Energy Charter Treaty that allows for investor-state dispute settlement? I argue that the EU should adopt a hybrid account involving amendments to the ECT. However, if these modifications prove unsatisfactory, the EU should withdraw from the treaty. This stance is rooted in the belief that the current framework fails to ensure an equitable distribution of the burdens of climate change, moreover, has the potential to undermine the EU's climate action initiatives. The first chapter will introduce to the existing literature on climate distributive justice principles, the concept of corporate social responsibility and the ECT. Followed by the second chapter that discusses how the ECT specifically affects the distribution of and compliance with climate burdens. The third chapter will then propose possible pathways for the ECT, that might lead to a more just distribution of climate burdens.

B) Chapter I: Literature Review

Since this thesis ultimately aims at assessing equitable distributions of climate burdens between corporations and state actors, it is necessary to introduce the context this question is embedded in. Climate distributive justice focuses on the equitable allocation of the "[…] burdens

associated with managing climate change and its adverse effects […] amongst the relevant agents" (Page, 2012, p. 301). Moellendorf (2015) explains, examinations of climate justice necessarily lead to questions of responsibility, or in other words questions of "[…] who is called upon to deliver that which is owed to those who are owed." (p. 173). Or simpler: who should do what and who is owed what. Burdens of climate change are the disastrous natural consequences laid out above, but also the measures needed to take in climate mitigation (i.e. reducing risks of climate change) and adaptation (i.e. adjusting to present and future impacts of climate change) (Caney, 2010, p. 204). An example of a mitigation measure would be to pass a law that bans the use of fossil fuels to produce energy and thereby reduce GHG emissions, while an example for an adaptation measure would be to build seawalls preventing certain areas to flood. To Page (2012), the choice of "[…] an equitable division of adaptation and mitigation burdens is at bottom a normative-political problem." (p. 303). Therefore, it is necessary to determine the equitable division of burdens through a guided and (re-)testable assessment, since the assumption that everyone has a similar sense of justice (Rawls, 1971, p. 263) does not seem to hold in climate matters. Different frameworks of climate distributive justice provide different arguments for the *who*s and *what*s, that lead to a specific distribution of benefits and burdens across international society.

In the following I will introduce the traditional frameworks of climate distributive justice and the concept of corporate social responsibility which I will later refer to, to discuss and justify burden carrying by the actors relevant to this thesis: energy producers using fossil fuels and the EU.

i) Distributive Justice

When thinking about how to combat climate change, different policies are proposed. Those proposals, like stranding assets (Caney, 2016) or nationalizing fossil fuel companies (Green & Robeyns, 2022) all carry value judgements about who (the state, companies, or individuals) should carry more or less burdens. That is, when Caney proposes to strand assets, property rights and future profits of corporations and states are impacted, which indicates that companies will carry most of the climate mitigation burden. In Green and Robeyns' scenario of nationalizing fossil fuel companies, on first sight companies carry most of the burden since they are expropriated and will no longer make profits needed for their survival. But it is more nuanced than that: in the long term, individual taxpayers bear a financial burden when fossil fuel companies are nationalized. Phasing out of fossil fuel usage involves inefficient operations, lacking a focus on profitability and leading to financial losses. The costs of

compensating the owners for nationalization surpass the revenues, resulting in financial deficits. Ultimately, taxpayers bear the financial loss as the investment aims to reduce emissions by bringing the company to a standstill.

To make this value judgement of who carries which part of the burden, authors build on different frameworks of distributive justice. Some are based on rectificatory or corrective justice, like the Polluter Pays Principle (PPP) or the Beneficiary Pays Principle (BPP). Those principles build on the theoretical construct that the wrongdoer and the victim are in direct relation to each-other, and the amount of transaction is a direct consequence of and equals the wrong done (Weinrib, 2012). Another principle is the Able Pays Principle (APP), which is a moral principle not of corrective justice but one of beneficence (Shue, 2017, p. 592). Here the one who is financially capable or able should carry the climate burden. What unites all of these principles is the aim to distribute burdens in a fair, just or equitable manner.

The PPP is probably the most intuitive principle or framework to assess burden sharing, as it states that the share of the burden should be proportional to the share of emissions caused (Tan, 2023, p. 2). It is a moral principle that holds agents responsible for their actions with the consequence that the actors who cause harm are expected to provide a remedy for it. This is also why it is sometimes referred to as backwards looking or a principle of historical responsibility (Green & Robeyns, 2022, p. 63). Hulme and Short (2014) explain, that the PPP has two main dimensions. One is that the polluter has to internalize the costs of pollution by resorting to cleaner technologies, and the other is that the polluter will be held liable or responsible for caused harm to the environment (pp. 8-9). The idea of the PPP can also be found in the Principle of Common But Differentiated Responsibilities and Respective Capabilities (CBDR-RC), formalized in the United Nations Framework Convention on Climate Change (UNFCCC) during the Earth Summit in Rio de Janeiro in 1992 (Neumayer, 2000, p. 188). The PPP is also a very established principle of international environmental law (Sands et. al, 2012).

The second principle that can be applied to assess a fair share of climate burdens is the BPP. This principle proclaims that the share of the burden should be "distributed amongst states according to the amount of benefit that each state has derived from past and present activities that contribute to climate change" (Page, 2012, pp. 302-303). Actors who benefit from actions that cause environmental harm must be held responsible for them (Tan, 2023, p. 3), meaning they should pay the cost of mitigation and adaptation in climate change. This implies that the principle, too, is backwards looking. But it also contains a forward looking element, as it also targets existing and future benefits from harmful actions (Page, p. 307). The principle is another

interpretation of the CBDR-RC and carries important moral notions of having to pay back 'unjust enrichment' (Page, pp. 313-314).

The third classic principle for assessing burdens of climate change is the APP. As stated above this is more of a beneficence principle and forward-looking, since the share of burden here is proportional to the ability to bear the costs (Caney, 2010, p. 213). Shue (2017) compares the actor able and willing to pay with a "Good Samaritan" (p. 592). The APP does not look at past behaviour or wrongdoings but only looks forward at the present and future ability to help (Caney, p. 214). It can be traced back to moral principles of helping those in need when you have the opportunity to do so (Shue, p. 592). The idea of this classic principle can also be interpreted into the CBDR-RC in the UNFCCC within the "capabilities" of states. In the context of the UNFCCC, it means developed states have to carry a larger share of the burden because of their greater wealth.

As Tan (2023) explains, the different frameworks all have limits and provide room for objections (p. 5). Nevertheless, when used as lenses to assess climate justice, there is no need to decide on one principle if they come to common conclusions. The principles will later build the foundation for the analysis of whether the ECT can be considered a fair tool to distribute burdens of climate change with a focus on states and companies in Chapter II. Possible objections to the principles will be discussed then. Important to note for the further analysis is, that these principles are commonly applied to not only states but also companies (Caney, 2010, p. 219; Tan, 2023, p. 3; Neumayer, 2000, p. 188).

ii) Corporate Social Responsibility

It appears useful to also employ a concept that deals distinctly with corporations' share of the burden: corporate social responsibility (CSR). CSR calls upon companies or businesses to participate in tackling present day global challenges as climate change (Lambooy, 2010, p. 10). Through economic globalisation, corporations' business decisions "have a direct impact on all levels of society: economic, social, environmental and cultural" (Lambooy, p. 10). For that reason, those corporations have been "encouraged to conduct their business in a 'socially responsible way' and to pursue best practices" (Lambooy, p. 10). The reason behind this is the belief that companies, in their day-to-day business, have to find the balance between fulfilling expectations of their shareholders, stakeholders and societal, economic and environmental concerns (UNIDO, 2023). The concept of CSR tries to find guidance in those terms. Authors like Shue (2017) underline that companies are subject to moral principles like the "do no harm principle" (p. 593) which represents the baseline of the CSR. The concept of CSR is therefore

a basic normative and moral minimum standard for businesses' conducts outside of simply generating profit (UNIDO, 2023). In environmental terms, an application of the CSR could mean that corporations which rely on the use of fossil fuels in their production processes, and thereby emit a lot of GHG, restructure their production away from fossil fuels to more sustainable forms of production, or at least limit those emissions massively. CSR places an emphasis on self-regulation of businesses through voluntary contributions (Lambooy, p. 11), but of course also has to accord with legal frameworks (Lambooy, p. 15), as those are, too, reflective of normative and moral standards of society.

iii) The Energy Charter Treaty

One of the contexts in which both distribution of climate burdens and the CSR have been recently discussed was the following case:

In December 2019 the Supreme Court of the Netherlands (Hoge Raad) takes a landmark decision in climate change matters. The court finds that the state of the Netherlands, represented by the Dutch government, urgently and significantly needs to reduce GHG emissions (at least 25% at the end of the year 2020 compared to the level of the year 1990) based on a violation of its duty to mitigate climate change (Kingdom of the Netherlands v. Urgenda Foundation, 2019, 2.3.1). The ruling was publicly perceived as a big win in climate action and mitigation efforts (Schwartz, 2019). Following the court's ruling, the Dutch government amends its Coal Act in December 2021, restricting GHG emissions from coal-fired power stations by limiting their operations (Wet verbod op kolen bij elektriciteisproductie, 2019, Art. 2) to start the phase out of coal. Before the amendment comes into effect in January 2022, the Kingdom of the Netherlands already finds itself in a dispute settlement case in front of the International Centre for Settlement of Investment Disputes (ICSID) (RWE v. Kingdom of the Netherlands, 2019). Initiated by the RWE AG and RWE Eemshaven Holding II BV (in the following: RWE), who were immediately affected by the amendment due to their production facilities on Dutch ground and due to their use of the fossil fuel coal in their electricity production. This was followed by a public outcry, especially after the claimed compensation of 1.4bn Euros became public (Braun, 2021).

The claim is based on the Energy Charter Treaty from 1994, a multilateral international investment protection agreement which entered into force in 1998. The ECT was intended as a political commitment for East-West energy co-operation (Energy Charter Secretariat, 1998, Guide to the Energy Charter Treaty [GECT], 1). The objectives were to "build an energy community between the two sides of the former iron curtain, based on the complementarity of

Western markets, capital and technology and the natural resources of the East" (GECT, 3). The provisions of the ECT itself include the beforementioned international dispute settlement provisions. Art. 13 ECT provides investors of contracting parties with the right to submit disputes for resolution either to the national court or to any dispute settlement procedure that was previously agreed upon (like arbitrations in front of the ICSID). These provisions raise not only public concern but then culminated in EU debates about a withdrawal from the ECT. Ultimately, in July 2023, the EU Commission proposes a coordinated withdrawal from the investment agreement (EU Commission, 2023). Due to the fact that the EU member states and the EU itself create a big part of the signatories to the ECT (Energy Charter Treaty, 2023) and can cause a termination of the ECT once the EU collectively withdraws, the focus of this analysis will be on the EU. Another reason for the focus on the EU is the beforementioned tensions of the ECT with climate policies like the EGD.

What has not been studied so far is the application of climate distributive justice principles to international treaties. I will therefore discuss the interplay of climate distributive justice principles with the concept of corporate social responsibility and apply them to the Energy Charter Treaty.

C) Chapter II: Discussion

This part of the thesis will discuss how the ECT affects the distribution of climate change burdens and the compliance thereof. The focus will be on the investor-state dispute settlement mechanism provided in Art. 13 of the ECT. I will argue that the ECT with its ISDS provisions is incompatible with equitable distributions of climate change burdens when looked at with climate distributive justice principles. I will also argue that energy production companies are currently not properly regulated, but that they have the freedom to self-regulate their climate impact in the current climate regime based on CSR. A proposal of a formal regulation approach will follow.

i) The Energy Charter Treaty and climate distributive justice

In which ways does the ECT and its ISDS mechanism not contribute to distributing burdens of climate change equitably? Is it compatible with any of the climate distributive justice principles? The GECT declares that the "provisions embody the important precautionary principle and that of "the polluter pays" […]", but it carries on further that the principle, in spite of that, is aspirational and not legally binding (ECT Secretariat, GECT 17 iv, 1998, p. 12). This means that the PPP should already be an inherent part of the established norms within the

ECT even if it cannot directly be subject to claims. But is it really inherently incorporated? As discussed above, the PPP states that the one who polluted, should carry the burden of the harm caused and will be held responsible for it. The polluter of GHG emissions has to internalize the costs of pollution. In the context of the energy production sector that would mean that the energy production companies would have to resort to cleaner technologies, already carrying in mind the pollution they would otherwise cause, as we can see with Hulme & Short (2014, pp. 8-9).

In the example case introduced to above, the RWE would have to resort to a different, less environmentally harmful source for the production of electricity than the one they are currently using: coal. But it is not that easy: one could also argue that the EU states have participated in the emission of GHG. In the end it was the host states in the EU, who invited the companies to build their production facilities on their grounds, knowing that they will pollute, and which means of production those facilities will employ. Considering that the production facility of the RWE in the Netherlands was only built in 2015 (RWE, 2023), the EU's participation through neglecting in the emission needs to be scrutinized. An internalization of costs of pollution concerning the EU could mean that the EU has to fulfil their legislative responsibility of creating rules and norms that prohibit certain harmful behaviour and also includes the negative responsibility (as in Shue, 2017, p. 592) not to invite companies to harmfully produce on their grounds. The element of causation plays an important role here (Shue, p. 593). One could argue that in the chain of causation of GHG emissions, the direct causal link is between corporations and the emissions themselves. But that there is no direct causation between the states and the emissions since the states themselves do not pollute. Instead the causal chain necessarily involves the actions of the corporation polluting as a connecting element between the EU and the emissions. This shows how difficult it is to assign the responsibility to different actors given how related those actors and their actions are. Directly polluted have the corporations and therefore mainly responsible for the harm caused have to be the corporations themselves. Nevertheless, we cannot deny the involvement of the states of the EU in the same pollution. The ECT however, seems to enable corporations to "work around" their responsibility by claiming compensations through the ISDS mechanism for future losses of profits from their investments, when EU states are trying to fulfil their responsibility of creating environmental laws that prohibit this harmful behaviour. In these arbitrations the "embodied" principle of PPP seemingly does not carry as much weight as it should, although the ECT leaves room to be interpreted in an environmentally friendlier way (Brown, 2022). But since this is not the case in practice, the ECT is not compatible with the

PPP. It is plausible to say that this was intended in the first place, when the principle was included as aspirational and not legally binding.

The BPP brings in another nuance and that is in aiming at distributing burdens of climate change based on past, present and future *benefits* that result from harmful actions against the climate. The energy production sector, with its largest western oil and gas companies, the so called 'big 5' namely ExxonMobil, Shell, BP, Chevron and TotalEnergies, is highly profitable, making a combined $200bn in profits in 2022 alone (Milman, 2023). It is safe to say that they benefited from harming the climate on a massive scale. Looking at those benefits from harmful production means, they would have to carry an equally heavy load of financial burden. One could argue that they won't benefit in the future anymore, which is why they ask for compensations. But on the other hand, they knew that changes in environmental policies were going to come sooner or later, so they should and could have invested in enough research and development in green technologies.

Even if we do not take the benefits of the future into account, the corporations benefited the most. States and the EU benefitted from the taxes paid and the jobs created. But in investment contracts tax reductions, the so called fossil fuel subsidies or "dirty subsidies" (Ferguson, 2020), are not uncommon to attract those investments. So even though the EU has benefited, the fossil fuel corporations were able to generate €137bn of subsidies per year (Ferguson, 2020). The ECT, by providing room for compensation claims that run up into the billions as well, could therefore be argued to even distribute more benefits to the actor who already benefitted the most from the environmentally harmful energy production. One may ask: do compensations count as benefits? The corporations would argue that they don't, as they are only reimbursements of the property loss experienced. By definition, compensations cannot be benefits as they indicate the recognition of a loss or an injury that needs to be counterbalanced or offset (Oxford Reference, 2023). But "benefits" might need to be looked at in terms of the BPP and not via the standard legal definition. I would also like to question if corporations can really exculpate themselves to this extent. The harm their productions caused for the environment was known to at least Exxon Mobile Scientists since 1977 (Banerjee, Song, Hasemyer, 2015; Shue, 2017, p. 594). Furthermore the first IPCC report was published in 1990 and that environmental laws will change in the future due to that could have been reasonably expected. It therefore can also not matter that the strongest and legally binding environmental agreements only were agreed to in 2015 and 2019, 21 and 25 years after the ECT was founded. Another question is whether it really is of importance that states like the Netherlands promised a certain amount of profits. Can you reasonably ask for the fulfilment of a promise if you know

the one giving the promise will not be able to keep it? This assumption is morally questionable. Clear is, energy production corporations and investors have benefited massively from the environmentally harmful energy production. Since the ECT provides the legal ground for that it is not compatible with the BPP.

The APP sets as the determining factor for distributing climate burdens equitably the ability to pay for those burdens. Fossil fuel corporations are clearly able to pay. As we have seen above, the biggest oil and gas producers averaged $40bn in profits in 2022 (Milman, 2023). The Netherlands for example ended the financial year of 2022 with a national debt of $525.17bn (Statista, 2023). The RWE closed the financial year 2022 with an adjusted net income of $3.2bn (RWE, 2022). For the RWE the compensation sums of $1.4bn would lead to a bonus that amounts to almost 50% of its net income from 2022. When arguing in those terms, it is important to keep in mind, that it is not the purpose of states to be profitable but to "ensure a lot of the values we cherish" (Rutgers, 2008, p. 352), like providing a liveable future for its citizens. In terms of the APP the corporations in question are more able to pay for burdens of climate change than states. They are the actors able to pay but remain untouched. The ECT is therefore also not compatible with the APP as it allows for a situation in which states that are less able to pay bear a great financial burden.

To sum up, the ECT violates the distributive justice principles. It therefore does not distribute the burdens of climate change equitably.

ii) Self-regulation based on Corporate Social Responsibility

As we saw above, the ECT and its ISDS provisions lead to a distribution of climate burdens in which energy production companies carry less of the financial burden linked to the emission of GHG emissions than they should. The companies are not constrained in their energy production by climate laws and when they are the corporations can make use of the ISDS mechanism to compensate lost profits. Ultimately, this means that energy production companies are not (properly) regulated in their environmental actions, but that they are even left with the freedom to self-regulate their climate impact in the current climate regime. This self-regulation of companies is justified by the existence of CSR (Sheehy, 2012, p. 105). Moral-political norms like the distributive justice principles or the CSR are not binding which leads to the question whether this system of self-regulation can work at all. Compliance will always be dependent on the actor's motivation to comply and to constrain their own behaviour (Sheehy, p. 113). To Sheehy, corporations lacking the threat of the exercise of direct control are only motivated when public pressure is applied (p. 113). This might also be the reason why

some fossil fuel companies started to resort to greenwashing. And with a positive effect: the TV advertisements publicising the fossil fuel companies' efforts to address climate change actually resulted in more favourable attitudes towards those corporations' environmental behaviour (Friedman & Campbell, 2023, p. 493). Although the attitudes towards fossil fuel corporations might have changed for the better, environmental protection itself has not seen positive trends through this self-regulation approach. In a question from the European Parliament posed to the Commission by EP Member Silvia Modig (European Parliament, 2020, E-004267/2020) she states that the estimated activities in the fossil fuel sector which were protected by the ECT produced 87 gigatonnes of CO2 between 1998 and 2019. She also states that through the protection of the ECT, 129 gigatonnes of emissions by 2050 are still expected. CSR leaves too much room for companies to decide what actions they can take and when. The self-regulation through the concept of CSR does not seem promising in the future either. It also might give states room to point fingers to companies who should act in an environmentally friendly way based on the CSR. The self-regulation approach should not be followed anymore as it sets aside states' responsibilities.

iii) Formal regulation based on legislation by states and the European Union

Rather than emphasizing the need for unconventional thinking to address climate change, a more effective strategy may lie in a traditional approach, specifically through formal regulation. The ECT currently hinders the pursuit of equitable outcomes in the distribution of climate burdens. As seen above, the distributive principles, even though explicitly mentioned in the ECT, do only provide moral guidance but are not legally binding. Honoré (1993) explains, morality needs determinants, i.e. obligations, and that "morality depends on law in the sense that to create an effective obligation it must have recourse to law" (p. 5). Law then, can serve "rational co-operative morality" (Honoré, p. 11) and help us fulfil our moral obligations better (Honoré, p. 12). In our case, the Paris Agreement, a legally binding accord, serves as a catalyst for countries to adapt environmentally friendly policies. Similarly, the 2019 EGD aims to implement climate targets established in the Paris Agreement and holds binding status for EU member states. Individual EU states could then modify their policies in alignment with the EGD goals, particularly in crucial areas like the energy production sector. This thought goes back to Goodin's idea of states as moral agents. He explains that when "individuals are rightly […] excused from achieving the good through their own isolated actions […] then the collectivity must be empowered [...] to eliminate those barriers that block morally efficacious individual behaviour" (Goodin, 1995, p. 35). To Goodin, this collectivity is the artificially

created moral agent, the state, that is capable of deliberative action through its legislative and executive organs in pursuit of moral matters (pp. 35-36). To successfully adopt this formal regulatory approach based on legislation by moral state agents like the EU states and the EU, the morally problematic aspects of the ECT must be addressed. Addressing this issue becomes the initial step, asking states and the EU to fulfil their legislative responsibility laid out by Goodin, which logically must include altering laws or terminating treaties that lack social value and are incompatible with demands of climate distributive justice. Once the ECT is effectively dealt with, states and the EU can proceed with creating and changing environmental laws and policies without the looming threat of litigation. This formal approach would work to uphold climate distributive justice principles, inherently determining who should bear more or less burdens. It would provide (moral) clarity for all involved actors regarding permissible actions in spirit of Honoré's view on the purpose of law, potentially even necessitating the formalization of CSR in climate matters. This would reduce the latitude for companies to independently decide on their behaviour in environmental matters. Furthermore, the formal regulation approach could yield positive outcomes such as attracting investments in cleaner and greener technologies which is currently not attracted due to the protection of the ECT (Brauch, 2021, p. 7). By addressing the constraints imposed by the ECT, this strategy becomes essential in fostering an environment conductive to meaningful climate policy changes. In the subsequent discussion, potential pathways for addressing the challenges posed by the ECT will be explored.

D) Chapter III: Consequences for the Energy Charter Treaty

I concluded that the ECT is not compatible with distributive principles and that the concept of CSR does not create a remedy for that. Moreover, the ECT lacks specific targets for reducing GHG emissions, contradicting the primary goal of the EGD to reduce GHG emissions to a net zero by 2050 (EGD 2019, 2.1.1.). To address these concerns, various pathways can be considered for the ECT. Brauch (2021) outlines four potential approaches: amendment, agreement on a supplementary EU inter se agreement, member withdrawal, or complete termination. In the upcoming discussion, I will explore these pathways, taking distributive principles into account and remaining mindful of the EGD goals. The primary focus will be on legal considerations, as the feasibility of any proposal stands and falls by its legal realisability.

i) Amendment

A first possible pathway to bring the ECT in accordance with climate distributive principles and the main goals of the EGD would be to amend the treaty. Art. 13 and Art. 10 (1) of the ECT build the foundation for the arbitration cases (see e.g., Request for Arbitration RWE and NL, 20.01.2021, p. 6). Since the ECT is a multilateral treaty between states (ECT, 2023), the Vienna Convention on the Law of the Treaties from 1969 (in the following: VCLT) is applicable (Art. 1(a) VCLT). The Vienna Convention poses general rules about the formation, effect, and interpretation of treaties. Generally, a treaty can be amended if all parties to the treaty agree (Art. 39 VCLT). The exception is that the treaty which is intended to be amended provides specific rules for its amendment (Art. 40 VCLT). The ECT indeed does provide such regulations in Art. 42 ECT. According to Art. 42 (1) ECT any contracting party can propose amendments to the treaty. The proposed amendments are then considered and adopted by the Energy Charter Conference (Art. 42 (3) ECT, Art. 34 (l) ECT). According to Art. 42 (4) ECT the amendments then enter into force on the ninetieth day after the unanimous approval of the amendments. There are no prohibitions for amendments of any specific articles like the compensation and arbitration clauses. This means that, for example, Part V which regulates the dispute settlements, could be amended. Art. 26 ECT, which regulates the settlement of disputes between an investor and a contracting party, states that if disputes are not settled amicably, the investor to the dispute can choose to submit it for resolution to (a) the courts of the contracting party to the dispute or (b) to a previously agreed dispute settlement procedure (Art. 26 (2) ECT). A critique of the ISDS mechanism was that the arbitration procedure happens in front of 'shadowy tribunals' (Braun, 2021; Corporate Europe Observatory, 2020). The argument behind that was, that a lawyer who before was working for the claimant can later be appointed as a 'judge' in another arbitration procedure. This is common procedure in arbitrational courts and part of the Arbitration Rules formalised by the United Nations Commission On International Trade Law (UNCITRAL) (UNCITRAL Arbitration Rules, 2021, Art. 9). While it understandably raises questions about the objectiveness of the tribunal, the contracting parties have agreed on that form of dispute settlement voluntarily by signing and ratifying the ECT. Since this arbitrational procedure is a major concern, as it leads to unfair compensation agreements, a possible amendment to the ECT could involve changing Art. 26 ECT. The change could be to delete Art. 26 (b) ECT and only allowing submission of disputes to the courts of the contracting parties to the dispute. This could potentially lead to more equitable outcomes, as state courts can also involve political and moral questions in their judgements by interpreting the purpose and meaning of international agreements and norms. It could mean that there will

be lower compensation rulings that would reflect a more equal distribution of climate burdens, but also rulings that consider political international agreements and climate policies like the EGD from 2019. A possible counter argument could be that the court could then be biased in favour of the host state, but this could be avoided by resorting to a court of a contracting party that is not involved in the dispute. Additionally, EU states provide systems of checks and balances, so each party to the dispute could appeal the ruling until they reach the highest judicial authority. The ECT modernization attempt of the European Commission in 2022 failed and did not have Art. 26 (b) ECT and the sunset clause as targets, but aimed at adding articles which forbid e.g., "frivolous claims" (European Commission, 2022, ECT modernization, WK 9218/2022 INIT; European Parliament, 2022, 2022/2934(RSP)). The amendment of the ECT including a change of Art. 26 (b) ECT is therefore, although it has failed once, still a possible pathway.

ii) Inter se agreement

Another option is to form an inter se agreement between EU member states. An inter se agreement means that a handful of states create another agreement with each other that concretises their rights and duties between themselves which will deviate from their rights and duties towards other parties to the original agreement (Legal Information Institute, "inter se"). In this case, the EU states could form an inter se agreement with each other with the purpose to exclude intra-EU investment arbitration (Brauch, 2021). This is possible via Art. 41 (a) VCLT only, if "[…] the possibility of such a modification is provided for by the treaty […]" or (b) not prohibited by it. The ECT forbids via its Article 16 (1) ECT that "[…] two or more Contracting Parties […] enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement […]". This means that the ECT forbids the formation of an inter se agreement which intends to change the rules for ISDS. Tropper (2023) discusses a possible solution to this problem. Tropper proposes a "sliced up" inter se agreement. One that will remove Art. 16 ECT itself and a following inter se agreement that then excludes access to intra-EU arbitration. This could mean that at least no inequitable arbitrations between EU states took place anymore. An inter se agreement is consequently also legally feasible.

iii) Withdrawal

The third option is to withdraw from the ECT. This is generally possible and regulated by Part V of the VCLT. Art. 42 (2) VCLT states that a withdrawal can be done through obliging to the provisions for withdrawal of the treaty concerned. Generally, a withdrawal can happen by either single states individually or collectively (here united as the EU), or both. Article 47 ECT lays out the rules for that withdrawal. Article 47 (2) ECT regulates that a contracting party intending to withdraw from the ECT has to give notice of its will to withdraw. The withdrawal will then become effective after one year after the date of the receipt of the notification of withdrawal to the ECT's depository. But there is a so-called sunset clause in Art. 47 (3) ECT which has to be taken into consideration before a withdrawal. It rules: "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 […] as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.". This means that even if single states or the EU withdraw from the ECT, the provisions of the treaty including its compensation provisions, will continue to apply to investments made for another 20 years from the date when the withdrawal takes effect. This is of course alarming, and Tropper (2022) warns that a withdrawal from the ECT "might have the paradoxical effect of prolonging protection under the old ECT regime". To Tropper, the political effect this might have, is that the EU's intention to withdraw from the ECT might block proposed amendments to the sunset clause and arbitration provisions of the ECT. EU states would still have to calculate with compensation claims from outside of the EU until 20 years after the withdrawal. This means that the order in which the EU acts, makes a huge difference. Tropper argues, that "any governmental measures taken by states against fossil fuel investments in order to reduce carbon emissions will have to target already existing fossil fuel investments". Concretely, if the EU would decide to leave the ECT in January 2024, there could still be claims from outside of the EU up until January 2045. This needs to be considered by the EU states before making a decision. Remaining contracting parties to the ECT after a potential EU withdrawal, are mostly less developed states who are unlikely to be investors in energy production facilities in European states and from which the EU states, hence, do not have to fear litigation. Withdrawing from the treaty might therefore still be a plausible option. But it is also justifiable to stay party to the treaty and to first push for modernisations that end the ISDS provisions and the sunset clause. Both solutions are legally feasible.

iv) Termination

Brauch (2021) discusses the possible path of terminating the ECT (p. 7-8). This path builds upon the fact that it will be politically difficult to gain unanimity to amend the ECT and also the ECT's unfitness to attract sustainable and climate-friendly foreign investment. The ECT itself does not regulate the case of a termination which is why Art. 54 (b) VCLT jumps in as regulation. In this article the VCLT regulates that all parties to the treaty need to consent with the termination after consultation with the other contracting states. This solution therefore is also dependent on states outside of the EU. While this is a possibility, it is more than unlikely to reach that consent, mostly because of states like Japan, who are very dependent on the energy production with coal (Brauch, p. 8). The positive side of this solution would be that the sunset clause does not continue to function after a termination. This solution would be in line with the EGD from 2019 since the protection of harmful emissions would stop and climate-friendly foreign investment could start to take off. While termination would probably bring the most equitable solutions, it is politically very improbable that it will happen.

The exploration of the potential avenues reveals challenging legal scenarios with limited prospects for achieving a more environmentally just ECT. In light of this, I propose a combination of Tropper's (2023) recommendations with my own. Specifically, I suggest that the EU advocates for an inter se agreement that terminates Art. 16 of the ECT along with the sunset clause. Emphasizing the ECT's provisions related to environmental protection, as outlined in the preamble and Article 19, would be instrumental in this process. The preamble of the ECT underscores its commitment to international environmental agreements, such as the UNFCCC, and acknowledges the pressing need for environmental measures. Article 19 (1) explicitly considers the ECT's obligations under environmental treaties and aims to minimize adverse environmental impacts. It is pivotal to remind all contracting parties of these provisions. Subsequently, if the amendment would not be satisfactory, the EU should strategically orchestrate a collective withdrawal from the ECT. The EU could, at the same time, form an inter se agreement with the purpose of prohibiting arbitrational procedures between EU states, which could also be open to be joined by non-EU states. This proactive approach minimizes the likelihood of compensation claims and could therefore lead to a less inequitable distribution of climate burdens.

E) Conclusion

The question, whether the EU should leave the Energy Charter Treaty which allows for investor-state dispute settlement, has to be answered with "no, only if". The ECT is incompatible with climate distributive justice principles like the PPP, BPP and APP: it neither makes corporations that contributed most to pollution pay for that pollution, nor does it make corporations that benefited the most from harmful production processes carry a share of climate burdens relative to those benefits, and it certainly does not lead to a greater share of financial burdens for corporations, who have the financial ability to pay. According to the principles, the major share of climate burdens would fall into the hands of the energy production corporations. I argued that the concept of CSR does not participate in distributing the burdens of climate change more equitably, since it leaves too much room for corporations to self-regulate their impact on the environment. I then proposed a formal regulation approach of states and the EU. This formal regulation would include that states act upon their legislative responsibilities and create laws that enable effective climate mitigation measures, but also to leave international treaties like the ECT, that counteract climate mitigation. Since the ECT is the most frequently invoked investment protection agreement within investment disputes, it is necessary to first deal with the ECT. The EU and its member states need to urgently amend the ECT, so that investor-state disputes are not possible anymore in front of arbitrational tribunals but carried out in front of courts. The sunset clause, allowing for compensation claims up until 20 years after a withdrawal from the treaty, needs to be nihilated. If amendments of the ECT do not proof successful, the EU has to withdraw from the treaty in order to gain legal certainty and the security to plan climate mitigation measures for the long-term. It might also be beneficial to formalize the CSR in environmental matters, so that corporations have clear legal guidelines in their business conduct as well.

Limitations of this thesis include the political feasibility of the proposal. A modernisation of the ECT, proposed by the European Council, was once already blocked by the European Parliament. Further research could therefore take the political component into focus: which processes are politically necessary so that the ECT can successfully be amended? I have also not considered which effects an amendment, withdrawal or termination of the ECT would have on states outside of the EU. And which arguments would allow states outside the EU to agree to amendments or termination of the treaty. How can unanimity for a possible amendment be reached? With which domestic factors will an amendment be confronted if we not only look at it through the lens of a one level game (i.e. inter-state negotiations) but a two level game (i.e. intra-state negotiations). This builds grounds for further research.

This thesis contributes to make use of normative questions of climate distributive justice applied to international agreements, with an example of the international investment agreement ECT. It is necessary for the EU and the EU states to act upon their legislative responsibilities, which involves examining whether international agreements that they are part of, adhere to moral principles of climate distributive justice. It is not yet too late to take the necessary steps in climate change mitigation and it could start with revising international treaties to promote a more equitable global climate regime.

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