

Fossilized Treaties, Unjust Transitions: Reclaiming Regulatory Space for Climate Action in International Investment Law

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Abstract

The interplay between climate commitments under the Paris Agreement and international investment protection regimes has engendered a profound structural tension that threatens the bold regulatory measures necessary to restrict global warming to 1.5 °C. This article argues that the regulatory chill arising from the threat of investor-State dispute settlement (ISDS) claims routinely deters governments from pursuing essential fossil fuel phase-out policies. Although extensive literature critiques the ISDS system and delineates the concept of just transition, a notable void persists in establishing a direct, practical legal nexus between these spheres.

Employing a critical doctrinal and comparative methodology, supplemented by empirical review of recent arbitral decisions and quantitative trends in ISDS practice, this study bridges that gap. It examines landmark proceedings including *RWE v. The Netherlands* and *AngloAmerican v. Colombia* and contrasts the European Union's cohesive strategy (encompassing the Just Transition Fund and Carbon Border Adjustment Mechanism) with the international structure of Just Energy Transition Partnerships (JETPs). The article also evaluates the practical impact of the reformed Energy Charter Treaty. Its central contention is that isolated exceptions for climate measures fall short; a paradigmatic shift in investment law is imperative, acknowledging the regime's underlying incompatibility with climate duties as articulated in the International Court of Justice's advisory opinion of 23 July 2025. By embedding the core elements of just transition distributive, procedural and restorative justice directly into the substantive obligations of investment treaties, particularly the fair and equitable treatment standard, States can

construct robust legal defences, legitimise non-discriminatory regulation and forge a reform path reconciling investor safeguards with the urgent demands of the global climate crisis. Drawing on an empirical survey of more than 230 fossil-fuel-related ISDS cases through 2023, the analysis highlights the disproportionate burdens borne by the Global South and advances concrete proposals for mitigating regulatory chill.

Keywords: international investment law, energy transition, just transition, investor-State dispute settlement, climate change, Paris Agreement, regulatory chill, Energy Charter Treaty, treaty reform.

I. Introduction: The Paradox of Stability in the Climate Crisis

Humanity now confronts climate hazards of unprecedented scale and velocity. The Intergovernmental Panel on Climate Change's Sixth Assessment Report Synthesis (2023) makes plain that the opportunity to cap warming at 1.5 °C is swiftly diminishing, mandating a 43 per cent cut in greenhouse gas emissions by 2030 if catastrophic tipping points are to be avoided (Intergovernmental Panel on Climate Change, 2023). This scientific imperative requires governments to adopt swift, far-reaching regulatory measures to divest from fossil fuels. Yet a deep juridical contradiction stands in the way: the legal architecture constructed to assure economic predictability and protect foreign investments—bilateral investment treaties and multilateral instruments such as the Energy Charter Treaty—has become a major obstacle to the necessary climate transformation (Van Harten, 2015). Born in the post-colonial decades of the 1960s as instruments to secure overseas capital, these regimes have grown increasingly discordant with the global

climate order since the Paris Agreement of 2015. The discord is vividly illustrated by more than 230 known investor-State dispute settlement proceedings linked to fossil fuels by the end of 2023 (United Nations Conference on Trade and Development, 2024; International Institute for Sustainable Development, 2024). The resulting asymmetries weigh most heavily on the Global South, where Just Energy Transition Partnerships frequently struggle with mounting sovereign debt and institutional constraints (International Institute for Sustainable Development, 2024).

The historical roots of this tension are not accidental. International investment law emerged as a legal technology of empire, designed to insulate foreign capital from the regulatory volatility of newly independent States. In the climate era, that same technology has been repurposed perhaps unconsciously to preserve the fossil fuel status quo, thereby perpetuating a form of structural violence against those least responsible for the crisis and least equipped to adapt. Reclaiming regulatory space thus requires not merely technical reform, but a fundamental reckoning with the regime's colonial lineage and its contemporary role in entrenching global inequities.

This article probes this fundamental tension: how can States reconcile their international obligations to protect the environment with the stability and protection guarantees they owe to foreign investors? The position advanced here is that the answer lies not in choosing one duty over the other but in creatively redefining their relationship a redefinition that must acknowledge the regime's intrinsic incompatibilities with climate responsibilities. Regulatory chill the phenomenon whereby governments refrain from stringent environmental measures out of apprehension of expensive and protracted ISDS claims provides striking evidence of the difficulty (Van Harten, 2020; Johnson and Sachs, 2021). Although the academic community has long subjected this phenomenon to rigorous analysis (Sornarajah, 2017), a coherent and practically viable legal pathway to resolution has remained largely absent, particularly in light of mounting empirical evidence of its consequences for climate policymaking (Johnson and Sachs, 2021).

The present study seeks to bridge that gap with an original contribution. Diverging from scholarship that has focused predominantly on temporary exceptions or normative critique, it rejects both wholesale rejection of the investment regime and mere incremental adjustment. Instead, it advocates a justice-centred reorientation of investment law, grounded in empirical data drawn

from UNCTAD records (United Nations Conference on Trade and Development, 2024) and IISD assessments (International Institute for Sustainable Development, 2024). More precisely, the article proposes that the principles underpinning just energy transition distributive, procedural and restorative justice be incorporated as an interpretive and normative matrix into the substantive obligations of investment treaties, most importantly the fair and equitable treatment standard. Rather than offering transient derogations, this approach fundamentally reshapes the rationale of investment protection, aligning it with the goals of sustainable development and the Paris Agreement and correcting the regime's tendency to prioritise investor rights over climate imperatives.

The article is organised as follows. Section 2 maps the conflicting legal orders that regulate climate action and investment protection. Section 3 examines the chilling effect generated by ISDS, with particular attention to representative arbitral proceedings and an empirical comparative table. Section 4 frames just transition normatively and evaluates the operational efficacy of mechanisms such as the European Union's Just Transition Fund and international JETPs, highlighting the distinctive obstacles faced by the Global South. Section 5 presents a comprehensive reform package comprising model treaty clauses and practical implementation proposals. The conclusion reaffirms that reform of international investment law is not merely desirable but indispensable if a rapid, equitable and legally sustainable transition to net-zero economies is to be achieved.

II. Conflicting Legal Frameworks: From the Paris Agreement to the Energy Charter Treaty

The legal environment governing energy transitions is composed of a patchwork of multilateral, regional and bilateral obligations that frequently come into conflict. The Paris Agreement (2015) furnishes a worldwide normative structure to curb warming below 2 °C, striving for 1.5 °C, rooted in common but differentiated responsibilities and respective capabilities and the mandate to heighten ambition progressively via nationally determined contributions (United Nations Framework Convention on Climate Change, 2015). Conversely, the international investment regime rooted in bilateral investment treaties and the Energy Charter Treaty prioritizes investor stability, granting direct ISDS access for alleged infractions like indirect expropriation and breaches of fair and equitable treatment (Schill, 2006). These two bodies

of law, spanning over 230 known fossil-fuel-related ISDS proceedings by the end of 2023 (United Nations Conference on Trade and Development, 2024), pursue opposing goals, a discord amplified amid the International Court of Justice’s advisory opinion of 23 July 2025.

A State divesting coal power to fulfill its NDC may thus confront multimillion-dollar ISDS suits. Defending costs can inhibit even unbiased, climate-congruent rules. Instances like *Vattenfall v. Germany* (post-Fukushima nuclear exit) and *Philip Morris v. Australia* (plain packaging) exemplify this discord.

The European Union strives to navigate these clashes through expansive initiatives like Fit for 55 and REPowerEU, bolstered by the €19.32 billion Just Transition Fund to alleviate socio-economic dislocation in fossil-reliant areas. However, tools such as the Carbon Border Adjustment Mechanism due to become fully operational in 2026 have generated fresh legal controversies, with critics contending that it risks breaching WTO disciplines and reproducing contemporary forms of “green colonialism” (Espa, Francois and van Asselt, 2022). Such issues expose fragmented frameworks’ shortcomings in tackling energy transition complexities.

Recent evolutions heighten reform urgency. The Energy Charter Treaty modernized in December 2024, with amendments provisionally applicable from September 2025, excluding select fossil investments albeit with lengthy phase-ins and gaps (International Institute for Sustainable Development, 2024). Yet the EU, Euratom, and Member States’ coordinated exit (effective 2025–2026) reflects deep misalignment with climate mandates (International Institute for Sustainable Development, 2024).

III. The ISDS Threat: Key Cases and the Chilling Effect

The deterrent force of ISDS is most acutely felt in the energy sector. The *RWE v. The Netherlands* case provides a paradigmatic

illustration: following the adoption of the 2019 Dutch legislation requiring zero coal-fired electricity generation by 2030, RWE invoked the Energy Charter Treaty, alleging breach of legitimate expectations and indirect expropriation. Although the proceedings were discontinued in early 2024 after a domestic judicial ruling and settlement, the dispute sent a clear signal that even carefully designed, non-discriminatory climate measures remain vulnerable to prolonged and costly arbitral challenge. Recent empirical analyses record a continued rise in such disputes during 2023–2024, including *Anglo American v. Colombia* concerning the revocation of coal-mining licences (International Institute for Sustainable Development, 2024), with more than 230 fossil-fuel-related claims collectively seeking in excess of US\$ 80 billion (United Nations Conference on Trade and Development, 2024).

Arbitral tribunals have progressively expanded the scope of fair and equitable treatment to encompass legitimate expectations of regulatory stability an interpretation that substantially curtails States’ sovereign authority to regulate in the public interest (Titi, 2020). Empirical studies confirm the phenomenon’s wider ramifications: developing countries, in particular, frequently abstain from enacting stringent environmental legislation out of apprehension of litigation (Johnson and Sachs, 2021; Johnson and Sachs, 2020). By the end of 2023, investors had initiated at least 332 known fossil-fuel-related ISDS proceedings a significant share of the total treaty-based caseload while only 123 concerned renewable energy (United Nations Conference on Trade and Development, 2024).

This asymmetry deepens structural inequities: wealthier States possess the financial and institutional capacity to defend claims and absorb awards, whereas developing countries face disproportionately high policy risk, thereby impairing their ability to implement Paris Agreement commitments. The table below offers an empirical comparison of selected climate-related ISDS proceedings:

Case	Respondent State	Investor	Principal Claim	Outcome (as of 2024)	Impact on Climate Policy
RWE v. Netherlands	Netherlands	RWE (Germany)	Breach of FET via coal phase-out	Settled 2024	Temporary chill; policy ultimately upheld
Anglo American v. Colombia	Colombia	Anglo American (UK)	Indirect expropriation via licence revocation	Pending	Delay in green regulatory initiatives
Azienda Elettrica Ticinese v.	Germany	AET (Switzerland)	Lack of compensation for	Pending	Risk to phase-out laws

Germany			coal closure		
West Cumbria Mining v. UK	United Kingdom	West Cumbria Mining	Climate-based permit refusal	Pending	Heightened risk for NDC implementation
Glencore v. Colombia	Colombia	Glencore (Switzerland)	Suspension of mine expansion	Pending	Undermining environmental protection

Compiled from UNCTAD records (United Nations Conference on Trade and Development, 2024) and contemporaneous reporting (International Institute for Sustainable Development, 2024), the table illustrates a persistent pattern in which fossil fuels constitute more than 20 per cent of disputes.

withdrawal (March 2025) worsened issues but spurred renewables focus (International Institute for Sustainable Development, 2024). These underscore treaty safeguards' need for inclusive restorative mechanisms, revealing investment regime-equitable transition tensions.

IV. Just Transition as a Legal Framework: From Normative Aspiration to Robust Defence

Just transition, originating in labour movements and explicitly acknowledged in the preamble to the Paris Agreement, has matured into a foundational normative principle of contemporary climate governance. It demands that no segment of society be abandoned in the shift to low-carbon economies and rests on three interdependent pillars (Newell and Mulvaney, 2013):

- distributive justice equitable sharing of transition costs and benefits;
- procedural justicemeaningful participation of workers, communities and affected stakeholders;
- restorative justice redress for harms inflicted upon vulnerable groups.

Beyond ethical, these yield strong ISDS defences, bolstered by evolving judicial recognition of the nexus between human rights and climate obligations. A coal-divesting State can assert non-discrimination, legitimate public aims (mitigation/equity), and proportionality via EU Just Transition Fund or international JETPs.

Recent jurisprudence reinforces this. In *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland* (2024), the European Court of Human Rights ruled insufficient climate action violates Article 8 private/family life right, mandating effective mitigation (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, 2024).

Yet JETPs unveil Global South implementation hurdles, including scant grants (3–4 per cent), privatisation tilt, and community exclusion (International Institute for Sustainable Development, 2024). South Africa's JETP faces bottlenecks and meagre transition funds, Indonesia's expanded plan fragmented grants, institutional complexity, and captive coal persistence (International Institute for Sustainable Development, 2024). U.S. JETP

V. Reform Proposals: Institutionalising Justice in Investment Treaties

Piecemeal fixes inadequately counter regulatory chill's empirical evidence (Johnson and Sachs, 2021). The article proffers a three-tier reform package with implementation strategies:

A. Fair and Equitable Treatment Redefinition

FET should expressly clarify:

- No perpetual regulatory stability expectation in vital public interest realms like climate change.
- Non-discriminatory Paris-fulfilling or just transition-advancing measures per se breach not FET. Implementation: Incorporate chill risk assessments in treaty talks.

B. Model Treaty Clauses

Insert in new/renewed treaties, targeting inconsistencies:

- **Climate Exception Clause** "For doubt avoidance, non-discriminatory Paris-obliging measures, including fossil phase-out and just transition promotion, shall not constitute a breach of this Treaty, including fair and equitable treatment or indirect expropriation provisions." Implementation: Integrate with UNFCCC protocols for monitoring.
- **Redefined FET Clause** "Fair and equitable treatment requires customary international law alien treatment minimum standard accordance. No regulatory stability guarantee. General-application non-discriminatory legitimate public purpose measureslike environmental protection, health, or just transitionbreach not this standard unless arbitrary, grossly unfair, or due process-lacking." Implementation: Establish Global South legal defence funds.

C. UNFCCC Multilateral Protocol

Longer-term: Dedicated UNFCCC protocol establishing climate

regulation legitimacy standards and State-to-State dispute mechanisms preempting ISDS. Implementation: Align with 2025 ECT reforms minimizing chill (International Institute for Sustainable Development, 2024).

Limitations

This study is constrained by its reliance on publicly available ISDS data, which may understate the full extent of disputes due to confidentiality in many arbitrations. The primary focus on the Energy Charter Treaty limits generalisability to bilateral investment treaties, particularly those prevalent in the Global South. Empirical analysis is based on quantitative trends through 2023, potentially overlooking emerging 2024 developments. Qualitative aspects, such as community perspectives on JETPs, are drawn from secondary sources and would benefit from primary fieldwork. These limitations notwithstanding, the study provides a solid foundation for further research.

VI. Conclusion: From Conflict to Coherence in Pursuit of a Livable Future

The path to a 1.5 °C world is fundamentally juridical. Absent resolute investment law reform, international order obstructs climate action. This article demonstrates resolution demands imaginative relation reconfiguration, accounting Global South regulatory chill constraints (Johnson and Sachs, 2021).

The study's chief contribution: investment law's just transition-ization framework. Embedding distributive/procedural/restorative justice in treaty obligations chiefly fair and equitable treatment enables confident public interest regulation sans prohibitive ISDS liability. Reforms safeguard legitimate investor expectations, enabling sustainable economy long-term investment, resolving inconsistencies amid International Court of Justice's advisory opinion.

Until investment law is liberated from its fossilized past and reoriented toward the imperatives of planetary survival, the promise of an equitable and sustainable future will remain an aspiration rather than an attainable reality. The moment for that liberation is not tomorrow; it is now.

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