

Coal ransom: How the Energy Charter Treaty drove up the costs of the German coal phase-out



Summary

This briefing highlights the role the Energy Charter Treaty (ECT) has played in the German coal phase-out. It reveals that the ECT has influenced the coal phase-out in two important ways:

(1) To ensure the companies do not use the ECT to raise investment disputes, a contract was negotiated between the German federal government and the largest coal companies, RWE and LEAG. Within this legal framework, the companies held enormous negotiating power and were thus able to offload the risks of the coal phase-out to the general public.

(2) The coal companies were compensated at an unusually high level for waiving their ability to sue under the ECT, as agreed in the contracts. As the German government has admitted, this waiver was an important factor in the otherwise inexplicably high compensation granted to LEAG and RWE.

The case of the German coal phase-out demonstrates how the ECT makes the fossil fuel phase-out considerably more complicated and expensive. Immediate withdrawal from the ECT is therefore essential to ensure that it does not similarly impede the phase-out of the remaining fossil fuels.

Introduction

The German phase-out of coal-fired power generation was agreed in 2020. It requires the closure of the country's coal-fired power stations by 2038 – one of the latest dates in the EU. It has been widely criticised by climate scientists and environmental organisations for lacking ambition, for being incompatible with the Paris Agreement and for handing overly generous compensation to coal companies. The criticism has been so severe that the new

German government, which took power in December 2021, has agreed to bring forward the closure date of the last coal-fired power station to “*ideally 2030*”.

There are two separate tracks within the coal phase-out. One for lignite, also known as ‘brown coal’, which is mined and burned in Germany (see Box 1), and one for power stations burning ‘hard’ or ‘black’ coal, which is imported. For the latter, a phase-out model using auctions has been put in place.



Box 1:**Brown coal: Germany's dirty secret**

In 2021, more than 28% of Germany's electricity was produced using coal, two thirds of which was lignite, also known as brown coal.¹ Due to its low energy density, brown coal produces more carbon emissions per unit of electricity than any other fossil fuel. Six of the ten highest carbon emitting power plants in Europe are power-stations in Germany that burn brown coal.²

Brown coal is extracted from open pit mines, and burned in two regions in Germany: in the Rhineland, near the border with Belgium and the Netherlands, by RWE, and in Lusatia, south-east of Berlin, by LEAG. In order to make power generation from brown coal economically viable, it has to be strip-mined and burned in close vicinity to the mines. Open-pit mining causes huge environmental destruction and century-old villages are swallowed by the mines with the inhabitants being forced to move. The continued operation and expansion of open-pit mines has sparked lawsuits and large protests.

The most severe criticism from politicians, scientists and civil society is directed at the agreements on the phase-out of power generation using brown coal. The focus is on three elements in particular:

1. The costs: The two main companies mining and burning brown coal in Germany, RWE and LEAG, have been given a total of €4.35 billion (£3.64 billion) in compensation for the ending of coal-fired power generation by 2038. However, there are serious doubts as to whether this sum is reasonable, as it is so high.
2. The method: The instrument chosen to implement the coal phase-out is a contract, negotiated between the coal companies and the federal ministries involved. However, compared to a purely regulatory approach, the contract has a number of weaknesses, such as the lack of flexibility for future climate measures and legal uncertainty due to the contractual stipulation of a right to renegotiate in the event of significant changes.
3. The timing: The planned shutdown of the last coal-fired power plant in 2038 makes Germany one of the last EU countries to phase out coal. Calculations by Energy Brainpool on behalf of Greenpeace Energy show that in a 1.5°C warming scenario, a significant portion of Germany's remaining CO₂ budget – between 39 percent and 45 percent, depending on the CO₂ certificate price – would be used up by the burning of coal in these power plants.³

In light of these problems and shortcomings, the question that arises is *why* the federal government chose this approach.

This briefing reveals the role the Energy Charter Treaty has played in these choices. Its impact has been primarily on the first two elements, costs and method, so this briefing focuses only on these two and not on the concerns around timing.

The briefing is about the lignite or brown coal track of the phase-out. Henceforth when the term 'coal phase-out' is used, this is a shorthand for the phase-out of brown coal.

The Energy Charter Treaty: Corporate privileges for energy investors

The Energy Charter Treaty (ECT) is an international agreement from the 1990s on trade, transit and investment in the energy sector. The 53 parties to the treaty are mostly countries from Europe, West Asia and Central Asia. The treaty enables foreign energy investors to sue states for compensation in an arbitration tribunal if they consider that their profits are, or could be, negatively affected by actions of the state. Investors are making extensive use of this opportunity: more than 142 arbitration claims have already been initiated by investors against states under the Energy Charter Treaty,⁴ including the lawsuits brought by the German coal companies RWE and Uniper against the Dutch coal phase-out (see Box 5). The ECT grants investors more extensive property rights and much more favourable procedural conditions than state courts do (see Box 2).

“However, the little-known Energy Charter Treaty (ECT) is threatening the climate ambition of the EU domestically and internationally.”

Open letter by 300 parliamentarians from across Europe⁵

Germany, too, has been sued under the ECT repeatedly (see Box 3). Most notoriously, Swedish energy company Vattenfall brought a case over the German government's decision to phase out nuclear power. The case dragged on for almost a decade with up to €7 billion at stake. This mammoth procedure and the amount of compensation demanded has considerably increased awareness within government ministries of the dangers of arbitration claims. As a result of the difficulties and costs the arbitration claims created during the nuclear phase-out, when it came to the

Box 2:

Why investment arbitration is so dangerous

Investment arbitration under the Energy Charter Treaty gives energy companies significant advantages compared to ordinary courts:

- **Secrecy:**

Arbitration proceedings under the ECT are not public and allow practically no participation by third parties, such as affected residents or non-governmental organisations. Indeed, in some cases they are kept completely secret, so that neither the identity of the claimant investor, nor the defendant state, nor the amount of money involved are known to the public.

- **Selection of arbitrators:**

In investment arbitration proceedings, the investor bringing the claim and the state being sued can each select half of the decision-making panel. This gives investors considerable leeway in determining the outcome of the proceedings. In addition, the arbitrators in the proceedings are often business-friendly investment law experts.

- **Vague and broadly defined property rights:**

The property rights on which investment claims are based are kept vague in the ECT and are often interpreted very broadly by tribunals. This allows investors to sue in situations where this would not be an option in the ordinary courts.

- **Amount of money:**

Amounts awarded in investment arbitration proceedings often turn out to be higher than in national courts, including allowing an investor to claim much more than they actually invested.

- **No appeal body:**

In arbitration proceedings, the possibilities for appeal are extremely limited – only in exceptional cases can states challenge rulings.

- **Global enforceability:**

Arbitration awards can be enforced globally. If states lose cases and fail to pay compensation, investors can have their assets confiscated in other countries.

These characteristics also show that even the threat of taking legal action in such a biased system can be a bargaining chip to push governments to make concessions.



The nuclear power station in Brunsbüttel, whose closure led to Vattenfall's ECT case against Germany.

Photo: Quartl, Wikimedia Commons

coal-phase out, the government tried to avert legal action under the ECT in two ways. Firstly, by making generous “voluntary” payments to coal operators, and secondly by implementing the coal phase-out through a contract that would preclude arbitration claims under the ECT. Both of these issues will be examined in more detail below. First, however, we will take a look at the coal companies' ability to sue under the ECT.

ECT legal action options for coal companies

The Energy Charter Treaty allows foreign investors – provided they come from one of the more than 50 ECT member states – to file lawsuits with investment arbitration tribunals. Technically, this excludes cases in which investors sue their own country of origin, as well as lawsuits filed by investors from countries that are not party to the treaty. In practice, however, these restrictions can easily be circumvented: in numerous cases, arbitration tribunals have allowed ‘letterbox companies’ to initiate claims by investors against their home countries as well as claims from third countries.⁶

“The threat of investment arbitration claims of this kind can be sufficient to dissuade governments from legislating in the public interest. Therefore, the signatories to this letter see the Energy Charter Treaty as a major obstacle to [the] implementation of the Paris Agreement and the European Green Deal.”

Open letter by over 500 climate leaders

Box 3:**ECT lawsuits filed against Germany**

Germany has been sued four times under the Energy Charter Treaty already, but detailed information has only been made public about two of the lawsuits:

Vattenfall v Germany I:

In 2009, Swedish energy provider Vattenfall sued Germany for €1.4 billion in compensation after the City of Hamburg imposed strict water requirements for Vattenfall's coal-fired power plant in Hamburg-Moorburg. Vattenfall only dropped the arbitration claim once the city of Hamburg agreed to ease these requirements. Representatives of the Hamburg state government later said that the high compensation demands were instrumental in persuading the city to reconsider.⁹ In 2017, the European Court of Justice ruled against Germany for violating European environmental directives when approving the power plant.¹⁰

Vattenfall v Germany II:

After the nuclear phase-out was accelerated in 2011, Vattenfall again filed a claim in an arbitration tribunal, demanding compensation for the decommissioning of the Krümmel and Brunsbüttel nuclear power plants. The ECT dispute lasted for over nine years and caused more than €20 million in procedural costs for German tax payers. Five federal ministries were involved in defending the case. After Vattenfall had successfully challenged the processes of the nuclear phase-out twice in the German Constitutional Court, Vattenfall and the German government finally settled out of court with compensation of more than €1.4 billion. An energy economics analysis considers the size of this payment to be unjustified.¹¹ The pending arbitration ruling, averted by the settlement, may have contributed to the high compensation amount (although this is denied by the government¹²).

Little is known about two other ECT lawsuits against Germany. In these two cases, Austrian construction company **Strabag** and Irish energy investor **Mainstream Renewable Power** are suing over the subsidy system for offshore wind farms changing to an auction model. Both proceedings are ongoing.¹³

There is no doubt that the main owners of open-cast coal company LEAG would be eligible to sue under the ECT if they felt they had a claim. The owners are the Czech Energetický a Průmyslový Holding (EPH) and the PPF investment fund based in Jersey. The Czech Republic and the United Kingdom are both members of the Energy Charter Treaty.⁸ As a company based in Germany, RWE, the operator of the coal-fired power plants in the Rhineland, would prima facie not be able to take legal action against its own country. However, RWE, a company active throughout Europe, might try to bypass this rule by filing an ECT claim using a foreign subsidiary. In such a case, it would be up to the arbitration tribunal to decide whether the company actually has the right to sue and whether the claim would therefore be admissible.

While two rulings of the European Court of Justice (ECJ) restrict the possibilities for legal action within the EU, they can easily be circumvented in practice (see Box 4). In any case, the legal options of potential claimants from the United Kingdom are now not affected by the rulings of the ECJ.

The rocky road to ruling out ECT retaliation

In part to rule out such lawsuits under the Energy Charter Treaty or other investment treaties, the German government chose a contract with the operators of the coal-fired power plants as the instrument for the coal phase-out. A 2019 internal assessment by the Federal Ministry of Economics to the Chancellor's Office states that *"the introduction of regulatory law is likely to increase the risk of lawsuits."* Accordingly, it is *"to be expected that companies will seek international arbitration in addition to national legal action."*¹⁴ Furthermore, the ministry points to Uniper's threat of legal action against the Dutch coal phase-out (at that time Uniper had not yet filed suit, which it did in 2021, see Box 5). One reason for rejecting a regulatory phase-out was thus explicitly in order to avoid ECT lawsuits.

Instead, the German government negotiated a contract with the coal companies. In this contract, the companies explicitly waive their right to sue under the Energy Charter Treaty (§24 of the contract). According to an analysis by the organisation ClientEarth, this waiver of legal remedies does indeed preclude lawsuits under the Energy Charter Treaty for the most part.¹⁵ However, the contract comes with serious disadvantages compared to using a regulatory framework to secure the coal phase-out.¹⁶

Box 4:

ECJ ruling: The end of all worries for EU countries?

On September 2, 2021, the European Court of Justice (ECJ) declared that arbitration proceedings under the ECT between EU investors and EU member states violate European law and are therefore illegal.¹⁷ This ruling follows a 2018 decision that had already deemed arbitration under bilateral investment treaties within the EU to be incompatible with EU law (Achmea).¹⁸ Although this ruling will have an impact on arbitration proceedings within the EU, it cannot effectively prevent future proceedings, because:

- (1) Arbitration tribunals have ignored the ECJ's jurisdiction in the past and continued to consider themselves competent. Following the ECJ's Achmea decision, 56 arbitration tribunals dismissed its objections¹⁹ and continued arbitration proceedings despite the ECJ's clear position. It is to be expected that they will continue along this line.
- (2) The ECT offers virtually no protection against lawsuits by letterbox companies – indeed, many lawsuits are already filed through them. Law firms advise potential investors to funnel investments via a location outside the EU in order to take full advantage of the opportunities offered by the ECT.²⁰ This now includes the option of filing from a UK subsidiary or letterbox company.
- (3) While the enforcement of rulings between EU investors and EU member states is no longer possible within the EU, legal experts fear that courts outside the EU will recognise and enforce these judgments.

While the ruling by the ECJ does make proceedings within the EU more complicated and costlier, it will – in all likelihood – not be able to prevent them.

“Signing the contracts would severely tie the hands of legislators and the government in the future. We risk being left at the mercy of a hugely expensive agreement that would also be a disaster for the climate.”

*Ida Westphal, legal expert at ClientEarth*⁴⁴



The coal-fired power station Maasvlakte, which is at the centre of Uniper's ECT case against the Netherlands.

Photo: Zandcee, Wikimedia Commons

The negotiation of the contract gave the coal companies much greater influence over the outcome than would have been the case with a law or regulation. In the latter case, the coal companies would have been one of many interest groups in the regular legislative process, which would have taken place with the participation and scrutiny of the parliament and the public. Instead, they were the only partner in the confidential contract negotiations, with a successful outcome depending on their approval. The coal companies knew how to use this favourable negotiating position to their advantage.

The companies managed to unilaterally shift the risks and uncertainties of future energy policy onto the public. For example, the agreement does not provide for any scenarios that would lead to a reduction in compensation for the companies. The only noted exception is in the event of a rejection of the compensation level by the European Commission for reasons of state aid law.

Higher compensation payments, on the other hand, are possible if coal is to be phased out as early as 2030, if a decision to bring forward the phase-out to 2035 is made more than eight years in advance, or in case of other significant changes. The risks and uncertainties have thus been settled to the benefit of the coal companies, and at the expense of the taxpayers. In addition, the contract improperly restricts the scope of future governments and the options for action in the event of a course change in climate policy. The implementation of the coal phase-out by 2030 – which is necessary



The coal-fired power station Boxberg in Lusatia is supposed to close only in 2038 according to the German government's decision. Photo: Andreas Franke, flickr

Box 5:

RWE & Uniper lawsuits against the Netherlands

When it became apparent in the summer of 2019 that the Netherlands would accelerate its coal phase-out in order to be able to meet its international climate commitments, it didn't take long for Uniper's Dutch CEO to speak up: should the Netherlands, as announced, exit coal-fired power generation in 2030 without paying high compensation voluntarily, Uniper would sue under the Energy Charter Treaty. The decision was taken to go for the coal phase-out by 2030 nevertheless, and with this threat in the background, the two German coal companies RWE and Uniper negotiated compensation payments with the Dutch government. Yet for Uniper and RWE, the millions of euros offered by the Dutch government were still not enough – they each filed an arbitration lawsuit against the Netherlands in the spring of 2021, demanding a total of around €2.4 billion in compensation for the coal phase-out.

However, research conducted by the organisations SOMO and Ember suggests that the coal-fired power plants that will have to be shut down in 2030 are actually hardly worth anything.²⁴ In a study, the organisations show that profits have plummeted since 2018 and, according to current calculations, the power plants will begin making losses from 2022, or 2024 at the latest. The reasons for this are the rising price of carbon emission certificates and the increasing use of renewable energy. The ECT lawsuit thus gives RWE and Uniper a last opportunity to earn a premium on power plants that will soon be in the red.

according to the Paris Climate Agreement, as well as European and German climate targets – has been unnecessarily hampered.

The use of a contract, and the agreement negotiated between the coal companies and the federal government, thus show serious disadvantages compared to a regulatory solution. The main advantage offered by the contract is the extensive exclusion of arbitration claims, in particular under the Energy Charter Treaty.

High exit costs

In total, the coal companies RWE and LEAG are to receive €4.35 billion in compensation from the German government for shutting down power plants. Numerous experts consider this sum to be too high.²¹ After 2030, by law, power plant shutdowns will not be compensated at all.

During the process, the Federal Ministry of Economics changed its statements regarding the basis for calculating the compensations. Initially, in the explanatory memorandum to the Coal Phase-out Act for example, the ministry claimed to have arrived at the compensation sums by applying a “*formula-based compensation logic*”.²² After Greenpeace published the formula and criticised the assumptions it was based on as “*unrealistic*” and as “*leading to a systematic overvaluation of the compensation payments*”, the ministry changed its reasoning: the compensation sums were not the result of a formula, but of negotiations.²³

“[T]he Commission has doubts about the way in which the compensation amounts to RWE and LEAG have been justified by Germany. As a consequence, it doubts that the compensation is kept to the minimum required and that the amounts are proportionate.”

*Reasoning of the European Commission for the initiation of a review of the compensation for the coal companies*²⁵

However, there are a number of indications that the compensation levels are unreasonably high:

1. In a report written for Greenpeace, climate think tank Ember examines the conditions under which the formula cited by the ministry could have arrived at the amount of compensation granted. Its findings reveal that in three key aspects, the assumptions made were particularly favourable to the coal companies.²⁶ According to Ember's calculations,

the appropriate compensation amount for RWE and LEAG should have been a maximum of €343 million. According to this calculation, the companies are receiving twelve times the amount they should have been entitled to.

2. The environmental think tank Öko-Institut has also taken a close look at the compensation payments.²⁷ The researchers conclude that LEAG's high compensation of €1.75 billion in particular cannot be justified by the circumstances of the coal phase-out.²⁸ The Öko-Institut's analysis shows that the phase-out path agreed for LEAG's power plants was barely accelerated by the payments. An expert report commissioned by the Federal Ministry of Economics concludes that the additional mine rehabilitation costs for LEAG resulting from the coal phase-out amount to a maximum of €35 million.²⁹

3. The European Commission, too, has initial suspicions of the payments being inappropriately high, especially with regard to foregone profits and mine rehabilitation costs.³⁰ It is therefore subjecting the payments to an in-depth state aid review procedure.

“The compensation LEAG was granted is definitely excessive.”

Felix Matthes, Öko-Institut e. V., former member of the “Coal Commission”³¹

Ruling out the ECT increases coal compensation payments

How can these unreasonably high compensation payments be explained? The ministry itself cites the agreement made with the coal companies and their owners to contractually commit to waive the option of legal action under the Energy Charter Treaty: *“The quality and scope of the legal waiver [ruling out ECT cases] certainly played a role in the compensation discussion, but they were not the only deciding factors.”*³² By agreeing to the legal waiver, that attempts to prevent the coal companies from taking an ECT case, the coal companies were able to boost their compensation levels.

The fourth draft of the contract from June 2020, in which RWE and LEAG continued to demand changes, shows that the waiver of claims under the Energy Charter Treaty was a contested issue in the negotiation.³³ LEAG, for example, wanted to delete a contractual clause providing for an extended legal waiver under the ECT and other investment agreements.³⁴

Box 6:

ECT reform process: doomed to fail from the start

In response to the criticism of the ECT, many European countries have pinned their hopes on the modernisation negotiations currently underway. It is already clear, however, that the problems of the treaty will not be resolved within these negotiations. The four most important reasons for this are:

1. Amendments to the text of the treaty need the unanimous agreement of all 53 parties. Apart from the countries of the European Union, however, few member states seem interested in making far-reaching changes. The UK is not engaging constructively and is more focussed on expanding the investments protected under the treaty. Since possible amendments need to be ratified by all parties, the prospects of creating an ECT that is compatible with the Paris Agreement are extremely slim.
2. The proposals of the European Union – even though they go the furthest – still fall short of what is necessary from a climate policy perspective. For example, existing fossil fuel investments would continue to fall under the investment protection of the ECT for ten years after the amendments come into force. This would allow investor lawsuits against climate measures until well into the 2030s.³⁵
3. In the opinion of the EU, the treaty clauses that have enabled lawsuits against climate and environmental measures in the past should be retained, but in a slightly more limited form. Other countries are attempting to prevent even these minor changes. However the negotiations end, lawsuits against measures to combat the climate crisis cannot be ruled out in the future.³⁶
4. The arbitration system that makes the ECT so dangerous is not even part of the modernisation negotiations.³⁷ So far, the EU has had no success in adding the issue of arbitration tribunals to the negotiating agenda. But even if the EU were to have its way here, its proposals would still fall behind other EU trade agreements. As a result, the same, highly controversial, tribunals and arbitrators will be deciding disputes for the foreseeable future.

“The government is paying such a high price because it is afraid that otherwise, it might be caught up in proceedings before an international arbitration court for years.”

Prof. Tobias Stoll, University of Göttingen⁴⁵



Protest against the Energy Charter Treaty in front of the German Ministry for Economics in Berlin.
Photo: campact, flickr

8

RWE tried to prevent its own shareholders from also having to commit to such a waiver.³⁸ In the end, the two coal companies did not succeed with their demands – the clauses proposed for removal remain in the final text of the contract.

It is difficult to put a precise figure on the costs caused by this waiver of legal remedies without further insight into the negotiation process. However, the example of the compensation granted to LEAG shows just how much of the compensation award has not been plausibly explained by the federal government. According to Ember’s analysis, for example, had the calculation formula been based on reasonable assumptions, LEAG would only be entitled to €189 million.³⁹ On top of that, there are mine rehabilitation costs of €35 million caused by the coal phase-out, according to the federal government’s calculations.⁴⁰

In other words, out of the €1.75 billion compensation granted to LEAG, there is no plausible explanation for €1.526 billion. Unless we assume that the federal government made unilateral concessions in the negotiations with LEAG, a significant part of this sum is likely to be explained by the waiver of claims under the Energy Charter Treaty. The case of LEAG is particularly interesting: the company’s owners were entitled to sue under the Energy Charter Treaty while the negotiations were taking place and this could have driven up the price they were able to demand for the coal phase out.

Conclusion

The Energy Charter Treaty has made the German coal phase-out both more complicated and costlier. In its attempt to avoid arbitration claims, the German government put itself on the back foot. It chose to use a contract as the instrument for the coal phase-out that granted coal companies a privileged negotiating position. As a result, the government paid far higher amounts of compensation than can be justified by the circumstances of the coal phase-out itself. The bulk of the inexplicably high compensation payments to the coal companies, to LEAG in particular, can only be plausibly explained as being in exchange for the companies’ agreement to waive the option of legal action under the ECT.

The German government has got around the risks that its membership of the Energy Charter Treaty exposes it to, but that has been dearly bought, at a very high price to the public purse.

“The integrity of the Paris agreement is critically undermined by the Energy Charter Treaty. Europe and others should withdraw from this shambolic and dangerous anachronism if we are to stay within 1.5C [of global warming].”

Laurence Tubiana, the French climate change ambassador during the UN Climate Change Conference in Paris 2015⁴¹

Research has shown that the fossil fuel infrastructure in the EU, UK and Switzerland protected by the ECT amounts to €344.6 billion.⁴² Considering the serious problems the Energy Charter Treaty has caused in the phasing out of coal, the phase-out of other fossil fuels must not be similarly hindered by the ECT. Experts have outlined a possible way to exit the Treaty, in spite of a sunset clause that allows for lawsuits up to twenty years after withdrawal.⁴³ To minimise the risks the Energy Charter Treaty poses to tackling the climate crisis, the governments all across Europe, together with other ECT member states, should initiate a withdrawal immediately. In a climate-friendly future, a relic of the fossil fuel age such like the ECT has no place.

List of sources

- 1 Statistisches Bundesamt (2021) Gross electricity production in Germany <https://www.destatis.de/EN/Themes/Economic-Sectors-Enterprises/Energy/Production/Tables/gross-electricity-production.html>
- 2 Tomos Harrison (2021) UK biomass emits more CO2 than coal, Ember, October <https://ember-climate.org/commentary/2021/10/08/uk-biomass-emits-more-co2-than-coal/>
- 3 Fabian Huenke (2021) Anteil künftiger Emissionen Deutscher Kohlekraftwerke am CO2-Budget, Brainpool Energy https://www.greenpeace-energy.de/fileadmin/docs/pressematerial/210812_FactSheet-EnergyBrainpool_Kohle-emissionen-2022-2038_CO2-Budget.pdf
- 4 For an overview of the cases see: <https://www.energy-chartertreaty.org/cases/list-of-cases/>. Since the lawsuits can be kept secret, there are clear indications that the actual number is higher.
- 5 Statement on the modernisation of the Energy Charter Treaty <https://www.endfossilprotection.org/sites/default/files/documents/Statement%20of%20European%20Parliamentarians%20on%20the%20modernization%20of%20the%20TCE.pdf>
- 6 For example, 24 out of 25 lawsuits by “Dutch” investors were filed through letterbox companies whose owners are not from the Netherlands. <https://energy-charter-dirty-secrets.org/de/#section2>
- 7 Open letter from climate leaders and scientists to signatories of the Energy Charter Treaty (ECT) <https://www.endfossilprotection.org/>
- 8 The Channel Island of Jersey has also acceded to the Energy Charter Treaty through the United Kingdom, see: <https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/united-kingdom/>
- 9 Michael Wech (2015) Konzerne klagen – Wir zahlen, Die Story im Ersten, from 35:10, available at: <https://www.youtube.com/watch?v=V2N29MqH0w>
- 10 Martin Ströder (2017) Genehmigung verstößt gegen Umweltauflagen, Juve Nachrichten, 3 May <https://www.juve.de/nachrichten/verfahren/2017/05/eugh-zu-kraftwerk-moorburg-genehmigung-verstoess-gegen-umweltauflagen>
- 11 Wolfgang Irrek (2021) Zur Höhe der Ausgleichszahlung für nicht mehr verstrombare Strommengen im Zuge des deutschen Atomausstiegs: Überschlägige Abschätzung, 11 May, <https://www.hubertus-zdebel.de/wp-content/uploads/2021/05/20210511-Irrek-Atomausstieg-Entschaedigung.pdf>
- 12 Answer of the Federal Government to Written Question No. 302 September 2021 https://www.bmwi.de/Redaktion/DE/Parlamentarische-Anfragen/2021/09/9-302.pdf?__blob=publicationFile&v=4
- 13 RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands (ICSID Case No. ARB/21/4); Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands (ICSID Case No. ARB/21/22)
- 14 See extract from the document “Bewertung Kohleausstieg durch Ordnungsrecht” sent by the Federal Ministry of Economics to the Chancellery on 31 October 2019. Available at the following link on p. 81, https://fragdenstaat.de/anfrage/dokumente-zum-energiecharta-vertrag-und-kohleausstieg/639279/anhang/211025-UIGBescheid-NAMEIII-Final_geschwaerzt.pdf
- 15 Amandine van den Berghe, Ida Westphal (2020) The German lignite phase-out contract and investment arbitration, ClientEarth Briefing, September <https://www.clientearth.org/media/vu5amwng/the-german-lignite-phase-out-contract-and-investment-arbitration-isds-ce-en.pdf>
- 16 In the following based on: Ida Westphal (2020), Stellungnahme zum Thema „Öffentlich-rechtliche Verträge der Bundesregierung mit den Braunkohlebetreibern“, Öffentliche Anhörung im Ausschuss für Wirtschaft und Energie des Deutschen Bundestages, 7 September <https://www.bundestag.de/resource/blob/711246/c8642c292aec135747bb-2d312e0114c0/stgn-sv-westphal-data.pdf>
- 17 Judgment of 2 September 2021, Republic of Moldova v. Komstroy, C741/19, LLCECLI:EU:C:2021:655 <https://curia.europa.eu/juris/document/document.jsf?jsessionid=-22321EF71C9053BFAB313B3D9AD939D2?text=&docid=245528&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=28131145>
- 18 Judgment of 6 March 2018, Slovak Republic v. Achmea BV, C284/16, ECLI:EU:C:2018:158 <https://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=28131539>
- 19 Stan Putter (2021) The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations, Kluwer Arbitration Blog, 24 August <http://arbitrationblog.kluwerarbitration.com/2021/08/24/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/>
- 20 Peter Rosher et al (2021) Moldova v. Komstroy (Case C-741/19): Key lessons and takeaways, Lexology, 16 September <https://www.lexology.com/library/detail.aspx?g=12fdc985-8785-45a0-a50d-e9ee80f2e1d6>
- 21 Klima-Allianz (2020) Studie: Entschädigungen für Braunkohle deutlich zu hoch – Öko-Institut macht Gegenorschlag, press release, 1 July <https://www.klima-allianz.de/presse/meldung/studie-entschaedigungen-fuer-braunkohle-deutlich-zu-hoch-oeko-institut-macht-gegenorschlag>; Sarah Brown (2021) Germany’s flawed assumptions behind €4.4bn lignite compensation: exclusive analysis, Ember, 16 May <https://ember-climate.org/commentary/2021/05/16/germanys-flawed-lignite-assumptions/>
- 22 Gesetzentwurf der Bundesregierung (2020) Entwurf eines Gesetzes zur Reduzierung und zur Beendigung der Kohleverstromung und zur Änderung weiterer Gesetze (Kohleausstiegsgesetz), Printed Paper 19/17342, 24 February <https://dserver.bundestag.de/btd/19/173/1917342.pdf>
- 23 AFP (2021) So kommen 4,4 Milliarden Euro für LEAG und RWE zusammen, Tagesspiegel, 15 May <https://www.tagesspiegel.de/politik/fragwuerdige-formel-fuer-kohle-entschaedigung-so-kommen-4-4-milliarden-euro-fuer-leag-und-rwe-zusammen/27193916.html>
- 24 Bart-Jaap Verbeek (2021) Compensation for Stranded Assets?, SOMO Longread, 21 April <https://www.somo.nl/compensation-for-stranded-assets/>
- 25 European Commission (2021) State Aid SA.53625 (2020/N) – Germany – Lignite phase-out, 2 March, https://ec.europa.eu/competition/state_aid/cases1/202117/292944_2268207_78_2.pdf
- 26 These are: future electricity and CO2 prices, low fixed costs for power plants and opencast mines due to earlier shutdown and the compensation period for early shutdowns. See: Greenpeace (2021) Strich durch die Rechnung, 4 June <https://www.greenpeace.de/themen/energie/wen-de-fossile-energien/kohle/strich-durch-die-rechnung>
- 27 Felix Matthes et al (2020) Assessment of the planned compensation payments for decommissioning German lignite power plants in the context of current developments, Öko-Institut e.V., 29 June, <https://www.oeko.de/fileadmin/oekodoc/Assessment-of-the-planned-compensation-payments.pdf>
- 28 In case of RWE, this depends on the amount of the conversion costs of the opencast mines, according to Öko-Institut
- 29 Michael Ritzau et al (2020) Ermittlung von Folgekosten des Braunkohletagebaus bei einem gegenüber aktuellen Braunkohle – bzw. Revierplänen veränderten Abbau und Bestimmung der entsprechenden Rückstellungen, Gutachten im Auftrag des BMWi, 14 December https://www.bet-energie.de/fileadmin/redaktion/PDF/Studien_und_Gutachten/Gutachten_Folgekosten/Gutachten_Folgekosten_Braunkohleausstieg_Abschlussbericht.pdf
- 30 European Commission (2021) State aid: Commission opens in-depth investigation into compensation for early closure of lignite-fired power plants in Germany, 2 March, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_972

31 Lutz Polanz, Achim Pollmeier (2020) Kohleausstieg: Viel Geld für wenig Klimaschutz, Monitor, 9 July <https://www.wdr.de/daserste/monitor/sendungen/kohleausstieg-144.html>

32 Nico Schmidt (2021) Wie Schiedsgerichte Europas Klimaziele bedrohen, Buzzfeed News, 23 February <https://www.buzzfeed.de/recherchen/energiecharta-vertrag-schiedsgerichte-europa-klimaziele-90214917.html>

33 See draft 4.0 of the contract, published after a request under the Freedom of Information Act, p. 14f https://fragdenstaat.de/anfrage/dokumente-zum-energiecharta-vertrag-und-kohleausstieg/639279/anhang/211025-UIGBescheid-NAMEIIFinal_geschwaerzt.pdf

34 In draft 4.0 of the contract, LEAG suggested to delete §24(4) of the contract.

35 European Union (2021) Text proposal for the modernisation of the Energy Charter Treaty – additional submission https://ec.europa.eu/energy/sites/default/files/eu_submission_-_revised_definition_of_economic_activity_in_the_energy_sector.pdf

36 European Union (2020) Text proposal for the modernisation of the Energy Charter Treaty https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf

37 International Energy Charter (2018) Approved Topics for Modernisation of the Energy Charter Treaty, 29 November <https://www.energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty/>

38 In draft 4.0 of the contract, RWE suggested to delete the relevant sections of §24(4).

39 See Greenpeace (2021), footnote 27

40 Michael Ritzau et al (2020), footnote 30

41 Arthur Neslen (2021) Energy lawsuits pact seen threatening Paris climate deal, Reuters, <https://www.reuters.com/legal/litigation/energy-lawsuits-pact-seen-threatening-paris-climate-deal-2021-10-01/>

42 Oliver Moldenhauer, Nico Schmidt (2021) ECT data analysis: Results and Methods, Investigate Europe, 23 February <https://www.investigate-europe.eu/en/2021/ect-data/>

43 Nathalie Bernasconi-Osterwalder et al (2021) Energy Charter Treaty Reform: Why withdrawal is an option, Investment Treaty News, 20 July <https://www.clientearth.org/latest/documents/energy-charter-treaty-reform-why-withdrawal-is-an-option/>

44 ClientEarth (2020) Braunkohle-Ausstieg: Bundesregierung macht sich erpressbar, press release, 22 June <https://www.clientearth.de/aktuelles/medienkontakt/braunkohle-ausstieg-bundesregierung-macht-sich-erpressbar/>

45 Petra Pinzler (2020) Warum der Kohleausstieg so teuer ist, Zeit Online, 3 July <https://www.zeit.de/wirtschaft/2020-07/kohleausstieg-energie-wende-leag-rwe-entschaedigung-bundesregierung>

All hyperlinks were reviewed on January 26, 2022.

Photo credits

Cover picture <https://pixabay.com/images/id-4294655>, Photo: jplenio, pixabay, Pixabay License, pixabay.com/de/service/license/

p.3 https://commons.wikimedia.org/wiki/File:Kernkraftwerk_Brunsb%C3%BCttel_2.jpg, Photo: Louis-F. Stahl, Wikimedia Commons, CC BY-SA 3.0 DE, <https://creativecommons.org/licenses/by-sa/3.0/de/deed.en>

p.5 https://commons.wikimedia.org/wiki/File:Nieuwe_centrale_Maasvlakte.jpg, Foto: Zandcee, Wikimedia Commons, CC BY-SA 4.0, <https://creativecommons.org/licenses/by-sa/4.0>

p.6 <https://fl.ic.kr/p/QUSMqy>, Photo: Andreas Franke, fl ic kr, CC BY-NC-ND 2.0, <https://creativecommons.org/licenses/by-nc-nd/2.0/legalcode>

p.8 "Energiecharta_kuendigen_Berlin-0965MoritzRichter", <https://fl.ic.kr/p/2m38j2T>, Photo: campact, fl ic kr, CC BY-NC 2.0, <https://creativecommons.org/licenses/by-nc/2.0/>

Imprint

Publisher:

PowerShift – Verein für eine ökologisch-solidarische Energie- & Weltwirtschaft e.V.

Greifswalder Str. 4, 10405 Berlin

Phone: +49 30 42 805 479

E-mail: fabian.flues@power-shift.de

Web: <https://power-shift.de>

Co-publishers:

Attac Germany

ClientEarth

Europe Beyond Coal

Forum Environment and Development

Global Justice Now

Munich Environmental Institute

Urgewald

War on Want

Author: Fabian Flues

Thanks for helpful comments to: Francesca

Mascha Klein, Ludwig Essig, Nelly Grotefendt,

Sonja Meister and Wiebke Witt

Editors: Vanessa Fischer, Alessa Hartmann

(German), Tom Walker, Jean Blaylock, Jane

Herbstritt (English)

Photo editing: Lilian Leupold

Translation: Anna Freundlieb

Layout, typesetting/drawing:

Tilla Balzer | buk.design

Berlin, London April 2022



This publication was supported by Olin g GmbH. Olin g GmbH is a funding organisation for environmental protection and conservation. It supports environmental and sociopolitical organisations.