A new variety of rights-based climate litigation
a challenge against the Energy Charter Treaty before the European Court of Human Rights
Nordlander, Linnéa; Monti, Alessandro

Publication date:
2022

Document version
Publisher's PDF, also known as Version of record

Citation for published version (APA):
A new variety of rights-based climate litigation: a challenge against the Energy Charter Treaty before the European Court of Human Rights

Linnéa Nordlander, Alessandro Monti

In the last couple of years, the European Court of Human Rights (ECtHR) has become a hotspot for rights-based climate change litigation. At the time of writing, seven cases are pending before the Court, with applicants seeking to challenge various aspects of domestic climate change laws and policies in the various respondent states, arguing that they violate their human rights protected by the Convention. On the 21st of June 2022, news broke that yet another case would be lodged before the Court. The case, however, is distinct from the others, in the sense that it targets state membership in an international agreement, namely the Energy Charter Treaty (ECT), on the grounds that it unjustly protects fossil fuel investors. The case (the ‘ECT case’) is the first before the Court to draw links between human rights, investment law, and climate change. This post seeks to situate such a claim in the context of cases currently pending before the ECtHR and highlights the challenges that applicants may come to face in their efforts.

A different type of claim?

Although the official application has yet to be made public, The Guardian’s article introducing the case indicates that the applicants, five individuals between the ages of 17 and 31 who have experienced extreme weather events, are bringing a claim against twelve high contracting parties to the ECHR (see also Le Monde’s article). The states have reportedly been selected on the basis that these ‘countries are home to companies that have been active users of the ECT.’ Similarly to many of the other climate change claims brought before the Court, the applicants allege violations of their rights to life and to private and family life, under articles 2 and 8 of the Convention respectively.

While the exact construct of the applicants arguments remains unknown at the time of writing, the framing of the claim against the ECT is novel. Of the cases pending before the Court, most are ‘systemic mitigation’ claims, meaning that ‘they challenge the overall effort of a State or its organs … to mitigate dangerous climate change, as measured by the pace and extent of its [GHG] reduction’ (Lucy Maxwell and others, 2022). This includes the two cases that the Court has relinquished to the Grand Chamber, namely KlimaSeniorinnen v Switzerland and Carême v France. The strategy resembles the one seen domestically in multiple jurisdictions, for instance through the landmark Urgenda v Netherlands judgment from the Supreme Court of the Netherlands in 2019, as well as the 2021 judgment from the German Constitutional Court, Neubauer et al v Germany.
To date, the outlier has been Greenpeace Nordic and others v Norway, where applicants are seeking to challenge licensing of oil and gas exploration in the Barents Sea. The case follows a different line of argument than the systemic mitigation cases, challenging a specific type of GHG-intensive project, as opposed to economy-wide GHG reductions.

With the filing of the ECT case, a second outlier has materialized. Distinctly from the other cases, the case appears to rely to a greater extent on materialized climate change impacts than other cases, where claims are typically made about preventing projected impacts. For example, arguments are made concerning the heightened risk of increasingly frequent and intense extreme events, like heatwaves and forest fires (see eg Duarte Agostinho and others v Portugal and 32 other states). Arguments based on impacts that have already transpired as opposed to projected ones may alleviate burdens of proving victim status, as previously discussed by Evelyne Schmid. Indeed, and although the specific events complained of remain unknown as of yet, it is noteworthy that attribution scientists have been able to conclude that the 2021 floods in Western Europe, as well as the 2017 wildfires in Spain and Portugal, were made more likely due to climate change.

A second, and perhaps even more notable point of distinction, is that in contrast with the other pending claims, the claim specifically targets membership of an international treaty, seeking to draw a link between legal protection of fossil fuel investors and harms stemming from extreme events like floods, forest fires and hurricanes. While litigation on the basis of an international treaty of this nature is novel before the Court, rights-based claims arguing for a need for legislative change to safeguard human rights in the context of climate change impacts are not. In that sense, the ECT case would build on a ‘classic strategy in human rights based environmental litigation’ (Savaresi and Setzer, 2022) in a novel way. However, drawing the link between the manifested impacts and state membership of the ECT will not be straightforward.

**Human rights litigation on the basis of international investment law?**

Beyond the hurdles common to rights-based climate change claims, such as establishing victim status, exhausting domestic remedies, and issues of extraterritoriality, on which much has already been written (see for example this post by Ole W. Pedersen), litigation on the basis of investment law may bring with it its own set of challenges. While it will only be possible to provide a comprehensive assessment of the potential of the claim once this will be made public, at least three issues can already be identified.

The first concerns the possibility for the Court to render a judgment that affects the participation of ECHR parties in other international conventions. While the Court can, and often does, find that the legal framework applicable in a given state is incompatible with its obligations under the Convention, the amendment of specific domestic law would likely fall within the scope of the states’ margin of appreciation, especially when the causal link between impacts and the law in question is not direct. Indeed, the ratification of, as well as the withdrawal from, international treaties such as the ECT is typically a prerogative of national legislators. Hence, should the claim be upheld, it appears to be beyond the
jurisdiction of the Court to order respondent states to take action as specific as withdrawing from the ECT, although the Court could require states to amend their domestic legal framework more generally, should human rights violations be linked to it.

The second open question relates to the prospects of a claim that singles out one specific investment treaty, the ECT, as the (only) one that is particularly problematic for climate action. The ECT undeniably gives rise to considerable challenges from a climate change perspective. Concluded in the 1990s with the primary purpose of fostering energy investments across Western Europe and the former Soviet Republics, the ECT has been widely criticized by climate and economic law scholars as a treaty that, protecting investments in clean and carbon-intensive energy sources alike, represents a threat to the achievement of the energy transition. In 2021, it became particularly evident how the ECT can undermine the achievements of human rights litigation for climate ends at the domestic level. A striking example is the lawsuits filed by RWE and Uniper against the Netherlands following the adoption of legislation aimed at phasing out coal power plants by 2030. Notably, that legislation sought to implement the Supreme Court of the Netherlands’ order in Urgenda for the government to reduce GHG emissions to at least 25% by 2020.

Yet, while numerous commentators have drawn attention to the risks of the ECT for climate action, so far the treaty has been mostly subject to legal challenges in relation to the numerous renewable energy claims brought under it. As well as leading to Italy’s withdrawal, this wave of claims has led to both the European Commission and, more recently, the Court of Justice of the European Union, arguing for the incompatibility of intra-EU claims with the EU treaties. In this regard, it is worth noting that the ECT, as a multilateral treaty, remained unaffected by the 2020 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union. Nevertheless, respondent Member States, backed by amicus briefs by the European Commission, have repeatedly argued before arbitration tribunals for the applicability of the Achmea verdict to the ECT, which excludes investment arbitration as a means for the resolution of intra-EU disputes. While such jurisdictional objections have largely been dismissed by arbitration tribunals, it is worth noting a recent exception in a case against Spain.

Despite the clear impact that the ECT has on climate change mitigation goals, it should also be noted that numerous other international investment agreements are equally well suited to protect investments that may hamper climate action. In fact, it has been argued that the risk of a chilling effect on regulation for climate objectives, far from being limited to the ECT, is an inherent trait of the current system of international investment treaties and arbitration. Significantly, a more comprehensive reform of the international investment regime ranks high on the agenda of UNCITRAL Working Group III, as well as other international institutions such as the OECD, which recently carried out an extensive public consultation to gather ideas on how to reform the system. For these reasons, it seems challenging for the Court to uphold a claim only targeting the ECT, while leaving other international investment agreements unaffected.
A third controversial aspect of the ECT claim concerns claimants singling out a number of ECT State parties, arguing that they have been ‘active users’ of the ECT. While such a claim is based on the empirical evidence to date, it does not seem a strong legal argument per se, as the same rights, including resorting to investment arbitration, are conferred upon investors incorporated in any of the ECT parties. It would not be possible for States to unilaterally limit a right to bring claims before investment arbitration tribunals, as it stems from an international treaty. Even assuming that the ECT claim is upheld, it appears plausible that such a judgment could ultimately foster forum shopping by investors, who might be incentivized to relocate to one of the remaining ECT signatory States.

**Implications outside the courtroom?**

Although the challenges the applicants in the ECT case face are numerous, litigation of this kind can also drive change outside of the courtroom. For instance, despite cases seeking more ambitious EU climate action being dismissed by the Court of Justice of the European Union, the Union has nevertheless revised, and heightened, its climate ambition (Hartmann and Willers, 2022). As such, even in the absence of a favourable outcome for the applicants, the existence of the claim itself could focus attention on the problematic aspects of the ECT from a climate change perspective and foster reform. In fact, the case could feed into the so-called modernization of the ECT, a reform process that was launched in 2019, also in order to better align the ECT with international climate commitments.

After 14 rounds of negotiations, little concrete progress has been made in the modernization process. The lag has triggered proposals by several scholars, NGOs, as well as members of the European Parliament, for an EU withdrawal from the treaty. Yet, even if such an option was pursued, it would not give rise to immediate consequences, given the sunset clause enshrined in Article 47(3) ECT, which allows investors to continue bringing their claims for a period of 20 years. Against this backdrop, by highlighting the potential human rights violations that the ECT could entail, the ECT case may incentivize parties to the Convention to further prioritise success in the ECT reform process, while the claim awaits judicial assessment.

*This post was written with support from the Independent Research Fund Denmark through the project ‘Enhancing Climate Action through International Law’. Project number: 0217-00328B.*