



# The Energy Transition in Europe: Understanding the Implications of the Energy Charter Treaty

Webinar Summary



# Introduction

On 12 January 2022, Generation Climate Europe (GCE) held the webinar *The Energy Transition in Europe: Understanding the Implications of the ECT*. With two legal specialists, we addressed the challenges posed by the Energy Charter Treaty (ECT) to the energy transition and possibilities for the future within the framework of limited modernisation. This webinar prompted a dialogue about climate advocacy and engagement, as well as the way towards an efficient and just energy transition.

Generation Climate Europe (GCE) is the largest coalition of youth-led networks at the European level, pushing for stronger action from the EU on climate and environmental issues. Uniting students, young workers unions, high-school, and university organisations, and environmental movements, GCE is an inclusive forum enabling youth to get involved in today's environmental debates.

Two legal specialists led our webinar. Ms. Hélionor De Anzizu is an attorney specialising in International Trade and Investor-State Dispute Settlements (ISDS) who works for the Center for International Environmental Law. Ms. Annette Magnusson is the co-founder of Climate Change Counsel and an attorney with more than 20 years of experience in international law. GCE Project Lead on the ECT and Free Trade Agreements (FTAs), Penny Kapusuzoglu, moderated the subsequent discussion. Hosted by GCE on Zoom, the participants were able to pose live questions and raise concerns for the speakers to respond to.



**Hélionor De Anzizu**  
*Staff Attorney, Center for  
International Environmental  
Law (CIEL)*



**Annette Magnusson**  
*Co-founder of Climate  
Change Counsel*

## Structure of the Event

The event lasted one hour and ten minutes, and consisted of two sections. The first was a set of two presentations, one by each speaker, giving the audience an overview of the Energy Charter Treaty, the *Komstroy* decision, and the modernisation process. The second section was an informal Q&A in which the panelists answered questions posed to them by the moderator and the audience.

## Presentations

[Hélionor de Anzizu - Staff Attorney, Center for International Environmental Law](#)

Ms. De Anzizu opened her presentation by providing an overview of international investment law, highlighting its primary aims as protecting foreign investments and facilitating investment flows. The **protection of investors' interests within the fossil fuel industry is likely to conflict with policy measures needed to respond responsibly and urgently to the climate emergency.**

As of today, the threat of Investor-State Dispute Settlement claims has also represented a factor that has discouraged ambitious state action necessary to address climate change (see for example the case of the *Hulot* Law in France or other discussions at COP 26) - but empirical research is difficult to do and not many policy makers are open to share publicly for different reasons. Criticism resolves the question of how adapted international investment law and the reasoning applied by arbitration tribunals understand and comply with the need for rapid evolution in energy and environmental policy, and which demands liability of investors that cause or contribute to environmental harm.

Ms. De Anzizu's summary of the ECT expanded on the protections it affords to fossil fuel investors, as well as the **inconsistency with which ECT protection standards are applied by arbitration tribunals.** The limited references in the ECT to climate change law and environmental law were also noted as a challenge.

Ms. De Anzizu indicated that, according to a report published by IISD (Investment Treaty News (ITN), Volume 12, Issue 3, October 2021) and the Report of the Working Group on Business and Human Rights on the issue of human rights and transnational corporations and other business enterprises presented at the U.N General Assembly in July 2021 (A/76/238), there is currently **no definitive evidence of a link between the existence of the ECT and other investment agreements, and an increase in foreign direct investments** among its contracting states. This may signal that the Treaty is not having a very strong effect in promoting international investments in energy. Additionally, she pointed out that most global investments in renewable energy were domestic rather than foreign.

Ms. De Anzizu examined the relationship between international arbitration and EU law, including the implications of the recent *Achmea*, *Komstroy*, and *PL Holdings* rulings. In this context, Ms. De Anzizu explained the Court of Justice's finding that the ECT cannot serve as a legal basis for intra-EU arbitration proceedings and discussed their implications for the enforcement of ECT decisions.

Ms. De Anzizu closed her presentation by examining possibilities for a post-Komstroy future. **As intra-EU awards have been stripped of their effect within the territories of EU Member States, enforcement of awards will largely depend on the jurisdiction where enforcement proceedings occur.** EU Member States will increasingly challenge intra-EU awards and resist compliance with them, and may expand their effort to challenge the enforcement of intra-EU awards outside the borders of the European Union.

### Annette Magnusson - Co-Founder, Climate Change Counsel

Ms. Annette Magnusson began her presentation by offering some results from an ongoing study by Climate Change Counsel into the **alignment between awards under the ECT and energy transition law and policy.**

Ms. Magnusson specified that out of 142 investment arbitrations initiated under the ECT, 86 were related to renewable energy sources and 47 were disputes relating to fossil fuels. Of the 64 cases reviewed in depth, Ms. Magnusson shared that most, if not all, of the renewable energy claims related to a systematic shift of energy policy, unlike in fossil fuel claims.

According to Climate Change Counsel's preliminary findings, **arbitration procedures under the ECT contain only limited references to international environmental law.** Only 20% of arbitrated claims had some form of mention of climate change policy, mostly pertaining to background information rather than an argument. Only one claim referenced the Kyoto Protocol, and no case earmarked the Paris Agreement. Additionally, energy transition policies are largely not discussed in the reasoning of the awards.

No clear conclusions may be drawn from the jurisprudence on the ECT's impact on the energy transition. Ms. Magnusson noted that private investments are important to drive the energy transition, and deadlines to reach net zero targets are short.

She acknowledged the divide in approaches to the ECT with some arguing for its complete removal and others praising its supposedly-neutral approach and deeming it unnecessary as a public instrument to further climate policy.

Ms. Magnusson concluded her presentation by calling attention to the role of youth in the energy transition, asserting that **more young voices are necessary in discussions about the ECT and climate action at different levels.** To make a difference, voices need to be heard in the rooms where decisions are made. In politics, in the corporate board room, with advisors. Raising awareness among youth, stressing an interdisciplinary approach to the ECT, and organizing to create meaningful change are instrumental in this regard. Time needs to be spent building for the future.

## Discussion

To open the discussion segment, the speakers were asked more about legal specifics and deficits in the current landscape for changes in the ECT.

Ms. De Anzizu highlighted the confluence of the obvious negatives and few benefits of the ECT.

The panelists identified some legal **benefits for smaller organisations** to use the ECT in the event of genuine injustice. Ms. Magnusson noted the **lack of conclusive evidence that the ECT has influenced the flow of incoming FDI**. Ms. De Anzizu noted that the implications of the ECT are not black and white; while it can assist in renewable investments, it clearly has negative repercussions.

Both speakers expressed that **if the ECT were to continue to exist as an international legal tool, modifications in its definitions and liabilities** in order to better integrate climate risks and clearly define boundaries for carbon-unfriendly projects would be the one way forward.

The question of withdrawal was also posed to the speakers. Given the lack of consensus on the issue between Member States, progress on it remains difficult. Ms. Magnusson highlighted the challenge of cutting across a variety of differing interests which is needed for a collective opinion; this must be solved before a collective withdrawal can ever occur.

The final question of the workshop addressed the subject of youth involvement. Both speakers advocated for **more involvement and stressed the need for youth participation in discussions on the ECT**.

Ms. De Anzizu argued for “the youth having a say at the table” of decision fora, and Ms. Magnusson agreed that young people are needed in the rooms where decisions are made. She declared that for change to happen, everyone needs to feel uncomfortable about current paradigms, reasserting that youth must raise their voices on these urgent issues.

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