**Young Climate Change Victims v Energy Charter Treaty**

**Main arguments of the Application Form and Annex filed before the European Court of Human Rights (ECtHR)**

***Note: This document provides the main arguments set out in each application and main annex filed with the ECtHR on 21 June 2022, for information purpose only. Amendments have been made in each application to reflect each applicant’s situation and to adapt to the ECtHR’s mandatory format.***

**APPLICATION FORM**

***STATEMENT OF THE FACTS***

1. The Applicant applies to bring claims against Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Luxembourg, the Netherlands, Sweden, Switzerland and the United Kingdomwith respect to the impact of the Energy Charter Treaty 1994 (the “ECT”) concerning the energy transition, climate change, and his/her rights under Articles 2, 3, 8 and 14 of the Convention. The Respondent States, in ratifying the ECT, have afforded private investors in the energy sector extensive protection against regulatory changes and access to exorbitant remedies through the ECT’s investor-State dispute settlement (“ISDS”) mechanism. The ECT in its current form significantly impairs the Respondent States’ and other ECT Contracting Parties’ capacity to take immediate measures to respond to climate change.

**CLIMATE CHANGE, HUMAN RIGHTS AND THE APPLICANT**

1. Climate change is universally recognised by States to be a “*common concern of humankind*” (Preamble to the Paris Agreement). The significant adverse impact of climate change on the enjoyment of human rights is now widely acknowledged by the international scientific,[[1]](#footnote-2) political[[2]](#footnote-3) and judicial community (Annex, §32).
2. Global warming was c.1.09℃ higher in the last decade than in 1850-1900[[3]](#footnote-4) and is on course to exceed 1.5℃ and 2℃ during the 21st century unless deep greenhouses gas (GHG) emissions reductions occur in the coming decades.[[4]](#footnote-5) According to the IPCC “*many changes due to past and future GHG emissions are irreversible for centuries to millennia*” and “*every additional 0.5°C of global warming causes clearly discernible increases in the intensity and the frequency of hot extremes including heatwaves and heavy precipitation*”.[[5]](#footnote-6) This is already having a significant impact upon the rights to life, and to private and family life of the Applicant who has directly suffered from extreme climate-related weather events [flooding /forest fires and extreme heat/ hurricane], leading to both material and mental health impacts (Applicant’s statement). Such events will become more frequent and their impacts will be more severe beyond 1.5℃ including in the region where the Applicant resides.[[6]](#footnote-7)
3. The legal framework on the issue of climate change is principally composed of the UN Convention on Climate Change (UNFCCC) and the Paris Agreement, whose Article 2 notably enshrines the goal of “*holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels*”.
4. The Respondent States must drastically and immediately reduce global GHG emissions. According to the IPCC, policies implemented by the end of 2020 are projected to result in higher emissions than in those announced at COP26 which are projected above the limit of global warming of the Paris Agreement’s long-term temperature goal of 1.5℃ (the “LTTG of 1.5°C”).[[7]](#footnote-8) According to the IPCC, to have a c. 50% chance of achieving the LTTG of 1.5°C, global GHG emissions should “peak at the latest before 2025” and be reduced by 43% below 2019 levels by 2030.[[8]](#footnote-9)

**THE NEED FOR IMMEDIATE MEASURES IN THE ENERGY SECTOR TO ACHIEVE THE LTTG OF 1.5°C**

1. Achieving the LTTG of 1.5°C requires major political intervention, especially in the energy sector, as fossil fuel combustion accounts for over 75% of global GHG emissions[[9]](#footnote-10) and the IPCC found that “[p]*rojected cumulative future CO2 emissions over the lifetime of existing and currently planned fossil fuel infrastructure … exceed the total cumulative net CO2 emissions in pathways that limit warming to 1.5°C with no or limited overshoot*” i.e. exceed the remaining carbon budget.[[10]](#footnote-11) Therefore, global fossil fuel production alone risks making the LTTGs of 1.5°C and 2°C out of reach.
2. Thus, the transformation of the energy sector (the “energy transition”) is an absolute imperative. According to the latest IPCC report, “*[m]eeting the ambitions of the Paris Agreement will require phasing out fossil fuels from energy systems*”.[[11]](#footnote-12) Given the urgency of reversing climate change, this must be done in the near term to prevent “carbon lock-in”.[[12]](#footnote-13) The best available science provides that “dramatic and sustained reductions in fossil fuel use and extraction” are needed, as achieving the LTTG of 1.5℃ requires that global levels of coal, oil and gas production are reduced by 69%, 34%, and 26% from 2020 levels by 2030.[[13]](#footnote-14) This necessarily implies action with regard to existing and projected fossil fuels infrastructures: according to the IPCC, “*[d]ecommissioning and reduced utilisation of existing fossil fuel installations in the power sector as well as cancellation of new installations are required”* to limit warming to 1.5°C.[[14]](#footnote-15) Even the conservative IEA Roadmap provides that no new oil and gas fields can be opened, approved, permitted, invested in and/or planned beyond projects already committed to as of 2021.[[15]](#footnote-16)

**THE IMPEDIMENT OF THE ECT ON THE ENERGY TRANSITION**

1. The IPCC has stressed that existing investment treaties, “*including the 1994 Energy Charter Treaty*”, can “*impede national mitigation efforts*”.[[16]](#footnote-17)

#### Investment protection and overcompensation under the ECT

1. The ECT is an international treaty concluded in 1994 and entered into force since 1998, which protects foreign investments made in energy supply. The ECT affords investors from Contracting Parties (i) substantial guarantees (“standards”) granting foreign investors specific rights vis-à-vis States, such as the right to a “fair and equitable treatment” and the prohibition of direct and indirect expropriation without adequate compensation; and (ii) procedural guarantees entitling investors to claim damages against States before arbitral tribunals, in case of breach of their “standards” of protection (“ISDS” mechanism).
2. These standards have been given extensive interpretation by arbitral tribunals[[17]](#footnote-18) thus affording investors operating in the energy field comparatively greater protection against regulatory changes through stronger assurances of stability and much higher compensation than before domestic and international courts.[[18]](#footnote-19) In the absence of rules on the determination of compensation, investment tribunals have adopted an approach to damage valuation based on hypothetical lost profits across the investment’s entire life cycle.[[19]](#footnote-20) This has led to the proliferation of speculative claims and huge damages.[[20]](#footnote-21)

#### The apparent conflict between the urgent measures required to achieve the LTTG of 1.5°C and the respondent states’ commitments under the ECT

1. The “unprecedented” regulatory changes required in the energy sector to achieve the LTTG of 1.5°C, such as the phasing out of fossil fuels, would inevitably curtail investments profits and expose States to threat of liability vis-à-vis ECT-protected fossil fuel investors.[[21]](#footnote-22) France, Spain, Germany, and the Netherlands, as well as the EU, have expressed doubts regarding the compatibility of the ECT with the Paris Agreement.[[22]](#footnote-23) Meanwhile, arbitration law firms have pointed to the ECT as a protection mechanism for energy investors against climate ‘regulatory risks’.[[23]](#footnote-24)
2. Recent empirical work has also stressed the high legal uncertainty over the way arbitrators assess conflicts between investor protection and States’ climate obligations:[[24]](#footnote-25) so far, they have shown poor consideration of States’ climate change commitments[[25]](#footnote-26) and a tendency to disregard States’ positive obligations under human rights law.[[26]](#footnote-27)
3. The ECT – the most employed treaty in ISDS cases[[27]](#footnote-28) – still largely protects fossil fuel investments (c.61% of ECT-protected investments[[28]](#footnote-29)), while fossil fuel investors have shown willingness and capacity to rely on ISDS.[[29]](#footnote-30) The increase of ISDS cases targeting climate-related measures has already been observed in the last decade, and is expected to rise at a greater rate.[[30]](#footnote-31) This is illustrated inter alia by:
4. two ECT claims launched in 2021 by German companies RWE and Uniper challenging the Dutch plan to phase out coal-fired generation by 2030 and seeking respectively EUR 1.4 billion and EUR 1 billion in compensation;[[31]](#footnote-32)
5. a USD 300 million claim by Rockhopper (UK) against Italy as it was denied a concession for oil drilling activities after all new oil and gas operations near the country’s coast were banned following citizens’ mobilisation;[[32]](#footnote-33)
6. a claim by Ascent Resources (UK) seeking more than USD 100 million from Slovenia following its recent fracking ban;[[33]](#footnote-34)
7. a claim initiated by a Clara Petroleum (UK) in April 2022 against Romania, in a context of local protests against fracking.[[34]](#footnote-35)
8. ECT claims or risks thereof have sometimes resulted in very favourable settlements in favour of fossil fuel investors. As an illustration, Germany implemented its coal phase out through a confidential agreement negotiated directly with coal companies, which received a total of EUR 4.35 billion and waived of their right to sue under the ECT.[[35]](#footnote-36)

#### The considerable financial pressure on States

1. A number of research studies have attempted to quantify the costs that States may incur from future ECT cases should they phase-out fossil fuel projects to implement the energy transition. They have valued the potential overall cost at:
2. EUR 523.5 billion,[[36]](#footnote-37) based on the average amount awarded in ISDS cases; this cost could increase to EUR 1.3 trillion should the ECT ISDS mechanism continue until 2050;[[37]](#footnote-38)
3. EUR 344.6 billion, based on an investment cost approach (*i.e.* the current value of ECT-protected assets), for the EU, the UK and Switzerland alone;[[38]](#footnote-39)
4. USD 111.5 billion,[[39]](#footnote-40) based only on the cancellation of upstream oil and gas projects (excluding coal or downstream infrastructure) that had not commenced production by the end of 2021 in accordance with IEA Net Zero Roadmap – a conservative approach as the best available science confirms that achieving the LTTG of 1.5°C requires early retirements of existing installations (above §7).
5. These studies demonstrate that States are exposed to considerable financial risks should they decide to act swiftly to pursue major transitions in the energy sector[[40]](#footnote-41) even though most tribunals considered the reforms to be reasonable and legitimate. Such a diversion of funds from climate action would impede the energy transition, especially in countries most vulnerable to financial risks (*i.e.* smaller economies, including those expected to join the ECT which host a large number of fossil fuel investments that would be protected[[41]](#footnote-42)). Besides, for investors to have such a form of insurance against regulatory changes, encourages new investments in fossil fuel activities and “slows the divestment necessary for the energy transition”.[[42]](#footnote-43) In recent years, ECT claims have increased at a faster rate in particular from investors incorporated in the Respondent States, indicating how vulnerable to ECT risks States are:[[43]](#footnote-44) so far Spain was ordered to pay more than EUR 1.2 billion in compensation and is still facing ECT claims for more than EUR 3 billion,[[44]](#footnote-45) even though most tribunals considered its reform was reasonable and legitimate.

#### The resulting chilling effect of the ECT on the energy transition

1. Against this background, threats of ISDS claims are likely to act as a strong deterrent for the Respondent States and other ECT Contracting Parties to rapidly engage in the energy transition, thus increasing the risks of “regulatory chill”.[[45]](#footnote-46) The regulatory chill refers to the effect that initiating or threatening ISDS proceedings can have upon States in scaling down, delaying or refraining from adopting public interest regulation to avoid the cost of compensation and litigation. As set out in the Summary Note on Regulatory chill, this phenomenon has been explicitly acknowledged by governments, international bodies, academics and prominent arbitration practitioners. Notably, the IPCC has recognised that investment treaties, including the ECT, allow fossil fuel companies “to block national legislation aimed at phasing out the use of their assets”.[[46]](#footnote-47)
2. Specific instances of regulatory chill in relation to energy policy have been observed, including in Europe. In particular, France is believed to have downgraded its plans to phase out fossil fuel extraction following threats of a billion-dollar ECT arbitration from Vermilion (Canada).[[47]](#footnote-48) Other examples of officials recognising the weight of ECT risks in their decision-making (e.g. Denmark, Germany, the Netherlands) are addressed in detail in the Summary Note on Regulatory Chill;[[48]](#footnote-49) in-depth case studies in other sectors have also proven that public interest measures were delayed due to arbitration proceedings against other States.[[49]](#footnote-50) ECT claims and threats thereof are often confidential and governments’ motives for adopting milder measures are undisclosed. Therefore, the scale of the chilling effect caused by the ECT cannot be accurately identified and is likely to be underestimated.

#### THE INADEQUACY OF THE MODERNISATION OF THE ECT

1. In 2017, the ECT’s Contracting Parties initiated discussions on the potential modernisation of the ECT. Negotiations started in July 2020 and an agreement in principle is expected to be reached on 24 June 2022.[[50]](#footnote-51) Such modernisation process is inadequate and insufficient for the following reasons:
2. the EU proposal provides that existing investments in fossil fuel as well as some new investments in some gas power plants, infrastructures and pipelines would remain protected 10 more years after the entry into force of the modernised agreement (until 2040 at the latest);[[51]](#footnote-52)
3. this “gradual exclusion of investment protection for fossil fuels” will at best apply only vis-à-vis States opting for it through a so-called “flexibility mechanism”;[[52]](#footnote-53)
4. the ECT’s ISDS mechanism is not included in negotiations;
5. no appropriate assessments regarding the proposed modernisation’s compatibility with the LTTG of 1,5°C seem to have been conducted, let alone provided to the public.[[53]](#footnote-54)

**URGENCY OF THE CASE**

1. There is scientific consensus on the pressing need to take urgent measures to drastically reduce GHG emissions. The IPCC has stressed that “*[a]ny further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all*”.[[54]](#footnote-55) This requires urgent phase out from fossil fuel; continued investments in fossil fuel infrastructure will lock-in emissions.[[55]](#footnote-56) There is thus little time left to avert uncontrollable effects of climate change. Postponing mitigation measures will only amplify the severity of climate impacts to the detriment of human rights.

***STATEMENT OF ALLEGED VIOLATION(S) OF THE CONVENTION AND/OR PROTOCOLS AND RELEVANT ARGUMENTS***

1. The ECHR is a “living instrument” and “must be interpreted in the light of present-day conditions” (Demir & Baykara v Turkey [GC], app. no. 34503/97, §§ 85-86), so as to ensure the practical and effective protection of Convention rights.
2. The interpretation of the Convention must also take into account “elements of international law [...], the interpretation of such elements by competent organs, and the practice of European States reflecting their common values” (Neuliger v. Switzerland [GC], app. no. 41615/07, §132). The relevant sources of international law are set out in the Annex.

***ARTICLES INVOKED:* ARTICLES 2 AND 8**

1. In general terms, Articles 2 and 8 are applicable if there is a serious and substantial risk to the enjoyment of the rights they guarantee (Tătar v. Romania, app. no. 67021/01 §§106-107 and Cordella and others v. Italy, app. nos. 54414/13 and 54264/15, §157). They are also applicable to cases in which the risk can materialise in the long term (Taşkin and Others v. Turkey, app. nos. 46117/99, §§107 and 113). The particulars of the thresholds for applicability are set out in the Annex.
2. As set out in detail above, climate change poses a serious and substantial threat to the rights guaranteed by Articles 2 and 8 of the Convention. It materialises in catastrophic threats to human health, including mental health, which are expected to increase in frequency and intensity.
3. The Applicant has suffered from [extreme flooding/ hurricane/forest fires] *[to be adapted to each Applicant]*, which have interfered with [his/her] right to respect for [his/her] private and family life, and [his/her] home. Furthermore, the Applicant suffers from severe harm to [his/her] well-being, resulting in climate-related anxiety in [his/her] daily life (Annex).
4. The Applicant is also expected to suffer from further extreme meteorological events, causing impact both on [his/her] home and [his/her] health and well-being. Other impacts of climate change are also to be expected, and will worsen over time (Annex, §§ 23-29).
5. In these circumstances, Articles 2 and 8 are applicable.

#### Positive obligations under articles 2 AND 8 (Annex §§ 41 to 42)

1. Articles 2 and 8 impose positive obligations upon States to take reasonable and sufficient measures to protect these rights from environmental threats (Tătar v. Romania, §107; Cordella and others v. Italy, §173). This involves, *inter alia,* a duty to establish an effective legal framework to prevent or reduce environmental risks to life and private life (Öneryıldız v. Turkey [GC], app. no. 48939/99, §§71, 89-90).
2. Measures taken by States in this context must be appropriate and based on available science (Jugheli v. Georgia, app. no. 38342/05, §§76-77). Therefore, States must enact regulation for “any activity, whether public or not, in which the right to life may be at stake” (Budayeva and others v Russia, app. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, §130), including by regulating the private sector (Tătar v. Romania §87).
3. As set out in the Annex, in the context of climate change, these obligations require the Respondent States to regulate and limit their emissions in a manner consistent with achieving the LTTG of 1.5℃ (“the overriding obligation”). In particular, this requires States to: (i) immediately take domestic mitigation measures to reduce their territorial emissions; (ii) limit the production and use of fossil fuels within their territories; and (iii) cooperate with other States in order to reduce global GHG emissions.

#### Positive obligations of States in the ECT context (Annex §§ 43 to 57)

1. In its current form, membership of and compliance with the ECT impedes the Respondent States’ ability to comply with their overriding obligation under Articles 2 and 8 in that it impacts the extent States – without the threat of liability – can:
2. urgently limit their territorial emissions by carrying out the energy transition away from fossil fuel-based energy to low-carbon sources;
3. prohibit the opening of oil fields, gas fields and coal mines within their territory; and
4. limit extraction from existing fossil fuel reserves in their territory. Furthermore, States’ duty to cooperate under Articles 2 and 8, in the context of climate change, requires States not to impede other States’ efforts to reduce their territorial emissions.
5. In these circumstances, the Respondent States are under a duty to take reasonable steps to remove the impediments created by the ECT to the fulfilment of their obligations under the Convention. Whilst the choice of means lies within States’ margins of appreciation, such steps may include:
6. negotiating relevant exemptions or amendments to the ECT;
7. withdrawing from the ECT;
8. adequately regulating companies within their jurisdiction to prevent them from bringing ECT claims against other States in relation to their climate mitigation measures. As partly evidenced by their protracted and ineffective steps taken to renegotiate the ECT to date, the Respondent States have failed to take such steps and are therefore in breach of Articles 2 and 8.
9. Pursuant to Article 41 of the Convention, the Applicant seeks declaratory relief from the Court, namely a declaration that to comply with their obligations under the Convention, the Respondent States have to remove the impediments created by the ECT which are inhibiting them from meeting the LTTG of 1.5°C.

***ARTICLES INVOKED:* ARTICLE 14 READ IN CONJUNCTION WITH ARTICLES 2 AND 8**

1. Age is one of the statuses upon which discrimination is prohibited (Schwizgebel v. Switzerland, app. no. 25762/07). Discrimination may occur indirectly where “a general policy or measure […] has disproportionately prejudicial effects on a particular group […] even where it is not specifically aimed at that group and there is no discriminatory intent” (SAS v. France [GC], app. no. 43835/11, §161). Such prejudicial effects will be discriminatory if they are not justified by a legitimate aim, or are disproportionate to that aim (Burden v. United Kingdom, app. n°13378/05, §60). The Applicant is, because of [his] age, expected to experience a greater interference with [his] rights under the ECHR than upon older generations. There is no justification for this disproportionate prejudicial effect. Therefore, the Respondent States have breached Article 14, read in conjunction with Articles 2 and 8.

***ARTICLES INVOKED*: ARTICLE 3**

1. Article 3 establishes an “absolute right” not to be subjected to inhuman or degrading treatment (Labita v. Italy [GC], app. no. 26772/95, §119). Article 3 notably entails a positive obligation “to take measures designed to ensure that individuals within their jurisdiction are not subjected to […] inhuman or degrading treatment” (O’Keeffe v Ireland, app. no. 35810/09, §144). This Court has acknowledged that Article 3 is relevant in an environmental context (Duarte Agostinho & others v. Portugal & 32 Other States, app. no. 39371/20, Information Note, December 2020). A range of circumstances have been found by this Court to amount to Article 3 breaches, including “feelings of fear, anxiety and powerlessness” (Volodina v. Russia,app. no. 41261/17, §75), notably when combined with “prolonged uncertainty” as to whether a situation will improve (M.S.S. v Belgium and Greece [GC], app. no. 30696/09, §263). A violation of Article 3 occurs when authorities only express indifference, denying the applicant’s right to hope (Vinter and others v. United Kingdom, app. nos. 66069/09 and others, §54). The Applicant is experiencing such feelings (statement, p. [x]) and is particularly vulnerable to such ill-treatment, especially in light of his young age. Thus, the Respondent States, by showing indifference to this situation, have breached Article 3.

***COMPLIANCE WITH ADMISSIBILITY CRITERIA LAID DOWN IN ARTICLE 35 § 1 OF THE CONVENTION***

**THE SIX-MONTH TIME-LIMIT DOES NOT APPLY TO THIS CLAIM**

1. As an exception to the six-month time-limit, a claim can be submitted at any time if it concerns a continuing situation or where no effective remedy is available (Sabri Günes v Turkey [GC], app. no. 27396/06, §54). Emissions of GHG is a continuing situation, as well as the absence of action to prevent the harmful effects of the application of the ECT. Thus, the six-month time-limit is not applicable to this case.

**ABSENCE OF AN ADEQUATE REMEDY AVAILABLE TO THE APPLICANT**

1. Article 35(1) of the Convention provides that: *“[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law […]”* (“the Exhaustion Rule”). The Exhaustion Rule is to be applied *“with some degree of flexibility and without excessive formalism”* (Mocanu and Others v. Romania [GC], apps nos 10865/09, 45886/07, 32431/08, para 224), it is *“neither absolute nor capable of being applied automatically”* (Kurić and Others v. Slovenia [GC], app. no. 26828/06, §286).Accordingly, applicants are not required to exhaust domestic remedies where the remedy in question is not available or effective (Kudła v Poland [GC], app. no. 30210/96, para. 152).
2. While noting that the Respondent States bear the burden of proving that the Applicant has not used domestic remedies which are effective and available (A and B v. Romania, apps nos. 48442/16, 48831/16, §105), the Applicant submits that no such remedies exist for six reasons, expressed hereunder and in the Annex.
3. First, the Applicant is a young adult and a student. Requiring him/her to exhaust domestic remedies would involve him/her having to pursue proceedings to their final conclusion in each of the Respondent States which would impose a disproportionate burden upon the Applicant in terms of cost, time and administrative resources (Veriter v France, app. no. 31508/07, §59; M.S. v Croatia (No 2), app. no. 75450/12, §§123-125). Such a requirement would be contrary to the principle that the exhaustion of domestic remedies rule ought not to be applied in a manner that would impose an unreasonable or disproportionate burden on an applicant (e.g. McFarlane v Ireland [GC], app. no. 31333/06, §124; Gaglione & ors. v Italy; app. nos. 45867/07 & ors, §22). This Court has already acknowledged, in a similar context, that these considerations are relevant (Duarte Agostinho and Others v Portugal and Other, app. no. 39371/20, Communication from the Court, 30 November 2020, pp. 3-4).
4. Second, compatibility of the ECT with energy transition required to avert dangerous climate change is a novel and supra-national issue (Hatton and Others v the United Kingdom [GC], app. no. 36022/97, Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič and Steiner). It is consistent with the principle of subsidiarity for the Applicant to have direct recourse to the Court in such circumstances as the Court is uniquely placed to provide guidance on the nature of the Respondent States’ obligations in this area of competing international commitments.
5. See the Annex for the four further submissions on this issue.

**ANNEX TO THE APPLICATION FORM**

# Introduction

1. This Annex accompanies the application form (“the Application”) and sets out the basis for the Applicant’s claim against the Respondent States.

# Legal reasoning

## Exhaustion of Domestic Remedies

The following paragraphs supplement the first and second submissions in Section G of the Application that no effective and available domestic remedies exist for the following reasons.

**Third**, the Applicant would have been unable to access remedies in many of the Respondent States. Climate litigation cases in a number of the Respondent States have been dismissed due to applicants having a lack of standing in domestic courts.[[56]](#footnote-57) Further, the ISDS arbitration mechanism under the ECT is not accessible to the Applicant and decisions under the ECT are largely beyond the review of domestic courts.

**Fourth**, the remedies in the Respondent States’ jurisdiction are not capable of providing redress in respect of the Application and do not offer reasonable prospects of success in that:[[57]](#footnote-58)

Domestic courts have often refrained from assessing the lawfulness of climate policies on the basis of deference to the executive and the separation of powers. Deference is particularly likely where commitments under international treaties are concerned, as this is traditionally considered part of the executive’s prerogative.

Even where the theoretical possibility of challenging general climate policy exists, to the Applicant’s knowledge there have been no successful climate cases in relation to States’ individual energy policies, international commitments and/or impediments to the energy transition.[[58]](#footnote-59)

**Fifth**, any proposed remedies would not be *“sufficiently certain”* and have not “*acquired a sufficient degree of legal certainty”* as there is no relevant domestic jurisprudence which confirms that a remedy would be available to the Applicant’s in any of the Respondent States.[[59]](#footnote-60)

**Sixth**, it would entail unreasonable delay to require the Applicant to exhaust remedies in all Respondent States.[[60]](#footnote-61) The time required would undermine the effectiveness of any remedies available due to the urgency of the climate crisis.

In those circumstances, Article 35(1) of the Convention provides no bar to the admissibility of the Application and, in any case, it is for the Respondent States to prove otherwise.

## Jurisdiction of States

1. The Applicant is in the territorial jurisdiction of *[adapted to each Application]*, on whose territory *[he/she]* resides. The Respondent States’ failures to regulate and/or limit their emissions as a result of their membership of the ECT and to adequately regulate companies within their jurisdictions produce effects within [this State] so that with regard to the context of climate change and the ECT, there are exceptional circumstances bringing the Applicant within the Respondent States’ jurisdiction.
2. Article 1 provides: *“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”*. Jurisdiction is primarily territorial but extraterritorial jurisdiction can be established in exceptional circumstances where there is a sufficient factual and/or legal connection between the individual and the Contracting State.[[61]](#footnote-62) It is thus well-established that “*acts of the States Parties performed, or producing effects, outside their territory can constitute an exercise of jurisdiction”*.[[62]](#footnote-63) Whether such a connection exists rests upon the application of a range of principles and factors to the particular facts of a given case.[[63]](#footnote-64)
3. Exceptional circumstances have commonly involved: (i) acts of diplomatic agents; (ii) exercise of public powers of a territorial State; (iii) use of force and exercise of physical control; (iv) control over territory; and (v) specific procedural circumstances, but are not limited to such situations.[[64]](#footnote-65)
4. At all times it must be remembered that the Convention is a special instrument of human rights protection and European public order, hence Article 1 should be interpreted so as to avoid a *“regrettable vacuum in the system of human-rights protection”* within the Convention legal space.[[65]](#footnote-66)
5. The Applicant is thus within the jurisdiction of the Respondent State in which [he/she] resides, and, in relation to the other Respondent States, within their extraterritorial jurisdiction for the reasons below.
6. The Applicant relies on special features in the context of climate change and the ECT that militate in favour of finding jurisdiction, namely:
	1. Climate change is a responsibility of all States in that each has contributed to and must take action to limit global warming to 1.5°C, including taking steps towards energy transition.
	2. The gravity of the climate impacts is significant and will be catastrophic if global warming surpasses 1.5°C (and even more so 2°C).
	3. The Applicant only asserts jurisdiction with respect to a very limited range of positive obligations which relate to the Respondent States’ membership of the ECT and its consistency with their obligations to regulate and/or limit their emissions and not to impede other States’ efforts to reduce their territorial emissions under the Convention.[[66]](#footnote-67)
	4. The Applicant has no alternative means of holding the Respondent States to account or preventing impacts of climate change associated with States’ membership of the ECT.
	5. The Respondent States and other ECT Contracting Parties must undertake deep and urgent emissions reductions and steps towards an energy transition, which are frustrated by their membership of the ECT.
7. Whilst prominent in other cases, a focus on physical power or control as determinative of jurisdiction would be inappropriate given the nature of climate change as involving indirect transboundary environmental harm and its multilateral dimension. Rather, the Applicant relies on a number of other factors, derived from the Court’s jurisprudence, which support a finding of jurisdiction, namely:
	1. Capacity:[[67]](#footnote-68) Given the multilateral dimension of climate change and the ECT, protection of the Applicant’s interests requires all the Respondent States to ensure that their obligations and/or membership under the ECT do not impede the rapid reduction of their and other States’ emissions and the speed of their energy transition in a manner inconsistent with achieving the LTTG of 1.5°C.
	2. Causation:[[68]](#footnote-69) Respondent States’ omissions to prevent the effect of the ECT in impeding emissions reductions and energy transition materially contribute to the risk that global warming will exceed the LTTG of 1.5°C and the corresponding impacts on the Applicant’s rights.[[69]](#footnote-70) The multilateral dimension of climate change and the ECT mean that extraterritorial and territorial Respondent States stand in the same causal relationship with the Applicant’s rights in terms of the risk of harm caused by their omissions.
	3. Foreseeability:[[70]](#footnote-71) The Respondent States have been aware of the occurrence and effects of climate change since 1992 at the latest.[[71]](#footnote-72) The need to undertake urgent emissions reductions and an energy transition, and the impact of the ECT in frustrating such action was entirely foreseeable.[[72]](#footnote-73)
	4. Duration: The Respondent States’ contributions to climate change have been long-lasting and will persist for decades into future, as global warming results from the cumulative emissions.[[73]](#footnote-74) These effects are expected to be greatly aggravated should the scope of the ECT be maintained or geographically expanded.
	5. Control over activities within territory and companies within jurisdiction: The Respondent States exercise control over fossil fuel activities within their territory which are protected by the ECT, as well as over companies within their jurisdiction which may challenge climate action of other States under the ECT’s ISDS mechanism.[[74]](#footnote-75)
	6. Relevant rules of international law:[[75]](#footnote-76) A finding of no jurisdiction would release the Respondent States from accountability under the Convention as regards transboundary harm caused by activities protected under the ECT and would impede the Applicant’s ability to access remedies, contrary to the prevention/no-harm principle and the right of access to justice under environmental law, *e.g.*, Articles 1, 3 and 9 of the Aarhus Convention respectively.
8. For these reasons, it is averred that the Applicant is within the jurisdiction of the Respondent States. To find otherwise would create a regrettable vacuum in the system of human rights protection within the Convention legal space.

## Victim status

1. Under Article 34 of the Convention, in order to establish that the Applicant is an *actual* victim [he/she]must demonstrate that [he/she]is “*directly affected*” by the alleged violation of the Convention[[76]](#footnote-77) and that a violation of the Convention is “*conceivable*” in [his/her]case.[[77]](#footnote-78) Conversely, applicants can establish that they are *potential* victims by demonstrating “*reasonable and convincing evidence of the likelihood that a violation affecting [them] personally will occur; mere suspicion or conjecture is insufficient*”.[[78]](#footnote-79) The Court has held that an “*excessively formalistic, interpretation of [the victim] concept would make protection of the right guaranteed by the Convention ineffectual and illusory*”.[[79]](#footnote-80)
2. The Court has recognised the victim status of applicants where to do otherwise would risk their Convention rights being nullified.[[80]](#footnote-81) In determining whether an applicant has victim status, the Court takes into account both the *nature* and *seriousness* of the complaint.[[81]](#footnote-82)
3. Whilst Article 34 does not permit a complaint *in* *abstracto* or an *actio popularis*, it is open to individuals to contend that laws violate their rights in the absence of individual measures of implementation if they are a member of a class of persons who risk being directly affected.[[82]](#footnote-83)
4. In cases of environmental harm, applicants need not demonstrate that they themselves have already been or will in future be harmed. The Applicant can instead establish that [he/she]has been directly affected and will be personally affected, by showing through evidence that:
	1. [He/She]resides in an area recognised as being at risk from the source of environmental harm; and
	2. There is a causal link between that source of environmental harm and increased risks to [his/her]life and health.[[83]](#footnote-84)
5. Against this background, it is submitted the Applicant is both an actual and potential victim of violations by each of the Respondent States of [his/her]rights under Articles 2, 3, 8 and 14 within the meaning of Article 34.
6. The current impact of climate change on human rights is well-established. The UN Human Rights Council states that “*climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life*”.[[84]](#footnote-85) According to the IPCC, *“[a]ny increase in global warming is projected to affect human health, with primarily negative consequences*”[[85]](#footnote-86) which “*have already been observed*”,[[86]](#footnote-87) as confirmed in its latest report.[[87]](#footnote-88) The WHO also states that “*Climate change is already impacting health in a myriad of ways […]*”.[[88]](#footnote-89)
7. Climate change can cause both physical and mental health impacts, notably “*trauma from weather and climate extreme events*” and “*mental health challenges associated with increasing temperatures*”.[[89]](#footnote-90) This is especially true for young people suffering from climate anxiety.[[90]](#footnote-91)
8. **First**,the Applicant directly suffers from the *current* consequences of climate change in the form of impacts to [his/her] life and health.
9. The Applicant was exposed to, and affected by extreme weather events related to climate change, notably by [flooding events/wildfires and intense heat/extreme meteorological events such as the tropical cyclone Irma which occurred in 2017], as detailed in [his/her] statement. [Further detailed in the Annex]
10. Such extreme events are connected to and exacerbated in frequency and severity by climate change, evidencing its already dire effects in Europe, as the mean annual temperature in Europe in the last decade was 1.94 to 2.01°C warmer than during the pre-industrial period.[[91]](#footnote-92)

[*Further detailed in the Annex*]

1. **Second**, the Applicant is a *potential* victim, as the impacts of climate change outlined above are increasing in frequency and severity, meaning that [he/she] will live at a time where the impacts of climate change are expected to be extreme, significantly threatening [his/her] rights under Articles 2 and 8 of the Convention.

[*Further detailed in the Annex*]

1. Such events pose a significant threat to the Applicant’ home as well as [his/her] health and life in violation of Article 2 and Article 8.[[92]](#footnote-93) The potential risks to the Applicant’s rights are particularly grave given [his/her] status as youth, as a large number of these impacts will materialise in the coming decades, over the course of [his/her] adult life. In addition, as described in his/her statement, the Applicant’s own experience has made him/her even more vulnerable to such impacts.
2. The Applicant is thus member of a class of persons (…) at significant risk of being affected by the Respondent States’ failures to comply with his Convention rights.[[93]](#footnote-94)
3. The threat of climate change induced harms will intensify over time,[[94]](#footnote-95) thus meeting the gravity threshold for the application of those provisions.
4. **Third**, that the Respondent States’ have not individually caused the climate impacts affecting the Applicant is no barrier to establishing victim status. Under the Court’s case law, it is not necessary to show a ‘but for’ test for causation.[[95]](#footnote-96) It has often been sufficient to show that a State’s failure to take reasonable available measures *could* have had a real prospect of altering the impact on an applicant’s rights.[[96]](#footnote-97)
5. In the context of climate change, there is a sufficient causal link between the acts and omissions of each Respondent State and the impact on the Applicant’s rights under Articles 2 and 8 in that:
	1. The Respondent States acts and omissions with regard to the ECT have materially contributed to the risk of the harm posed by climate change to the Applicant in circumstances where there are multiple contributing States causing “*indivisible injury”* to the Applicant.[[97]](#footnote-98)
	2. If the Applicant was denied protection of [his/her] Convention rights by reason of the inability to prove that each Respondent State individually caused global warming beyond 1.5℃, this would undermine the effective and practical protection of [his/her] rights in the context of climate change.
	3. The Applicant’s position is consistent with a growing body of case law within the Council of Europe’s Member States. Indeed, the Supreme Court of the Netherlands in *Urgenda Foundation v the Netherlands* noted that “*the defence that a state does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted*”.[[98]](#footnote-99) The Court of First Instance of Brussels,[[99]](#footnote-100) as well as the Federal Constitutional Court of Germany developed similar reasonings.[[100]](#footnote-101) Reliance on “*but for”* causation cannot be used to absolve each Respondent State of its share of responsibility regarding climate change mitigation in relation to energy transition.
6. **Fourth**, that there is a general public interest in mitigating climate change, and that the entirety of the world population will be impacted by the effects of climate change does not prevent the Applicant from being a victim under the Convention.[[101]](#footnote-102) In an environmental context, victim status was recognised for applicants which had suffered from pollution of an entire river over more than 800km,[[102]](#footnote-103) as well as for applicants suffering from toxic fumes from a factory which polluted more than one town.[[103]](#footnote-104)
7. The Applicant has provided evidence that [he/she] is an actual and potential victim under Article 34. Accordingly, the Application is not an *actio popularis* or *in abstracto* complaint. An application does not fall foul of these rules simply because the Court’s judgment may have wider implications beneficial to society as a whole.[[104]](#footnote-105)
8. In any event, in circumstances where victim status is closely linked to the merits of an application, as in the current case, the Court has considered that issues pertaining to victim status should be joined to an examination on the merits.[[105]](#footnote-106)

## Articles 2 and 8 ECHR

1. First, it is well-established that the Convention is to be applied in light of its object and purpose. As the Court stated in *Wemhoff v Germany*, “*given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, and not that which would restrict to the greatest possible degree the obligations undertaken by the Parties*”.[[106]](#footnote-107)
2. These Articles must be interpreted in accordance with the principle that the Convention must guarantee rights that are *“practical and effective”* rather than *“theoretical and illusory”*.[[107]](#footnote-108)
3. When interpreting and applying the Convention, the Court *“must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs and the practice of European States reflecting their common values”*.[[108]](#footnote-109) That said, States cannot dilute the effectiveness of Convention rights through their commitments in separate treaties.[[109]](#footnote-110) It was thus observed by the Commission in *X. v Federal Republic of Germany* (app. no. 235/56, 10 June 1958): *“If a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty, it will be answerable for any breach of its obligations under the treaty”.*

#### Applicability of Articles 2 and 8 in the context of climate change

1. Positive obligations under Article 2 “*must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake”*.[[110]](#footnote-111) Article 2 can be triggered in the absence of death or serious injury, and in relation to long-term risks.[[111]](#footnote-112) In the environmental context, there is no general requirement to demonstrate a real and immediate risk to the life of the Applicant.
2. Article 8 will be applicable where an individual is directly and seriously affected by an environmental nuisance.[[112]](#footnote-113) Article 8 has been applicable in cases in which the risk materialises in the long term.[[113]](#footnote-114) Accordingly, the Court has held that it can be engaged in a wide variety of cases involving environmental hazards, including, *inter alia*: (i) the dangerous effects of mining activities; (ii) mineral extraction; (iii) inadequate regulation of liquefied natural gas; and (iv) emissions from factories.[[114]](#footnote-115) There is no requirement for the Applicant’s health to be seriously endangered, a deterioration in the quality of life is sufficient to meet the minimum level of severity.[[115]](#footnote-116)
3. That Articles 2 and 8 are applicable follows from the submissions regarding victim status, the impact of climate change, and causation.

#### Positive obligations on States according to Articles 2 and 8

Articles 2 and 8 are invoked in conjunction with one another as the “*scope of the positive obligations under Article 2 of the Convention largely overlaps with those under Article 8*”.[[116]](#footnote-117) Those positive obligations include:

Substantive obligations: The Respondent States have a duty to take measures to protect the rights to life and private life from environmental nuisances.[[117]](#footnote-118) There is thus a duty, *inter alia*, to put in place effective legislative and administrative frameworks to prevent or reduce environmental risks to life and private life.[[118]](#footnote-119)

Procedural obligations: Decision-making processes leading to interferences must be fair and afford due respect to the interests protected under Articles 2 and 8.[[119]](#footnote-120) Decision-making processes must involve “*appropriate investigations and studies”*,[[120]](#footnote-121) *“assessment[s] in advance of potential risks of the activity in question”*,[[121]](#footnote-122) and that information must be publicly available.[[122]](#footnote-123)

1. Article 2 enshrines one of the most basic values of the democratic societies making up the Council of Europe.[[123]](#footnote-124) The Court has thus held that it must be “*especially vigilant*” in right-to-life cases given the severity of the consequences.[[124]](#footnote-125) In assessing whether the Respondent States have complied with their obligations under Article 2, the Court’s task is “*to determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant’s life from being avoidably put at risk*”.[[125]](#footnote-126) Under Article 8, it has been observed States must “*take reasonable and appropriate measures to secure the applicant’s rights*”.[[126]](#footnote-127)

#### Application of the positive substantive obligations in the ECT context

Fulfilment of the substantive obligations under Articles 2 and 8 in the context of climate change requires each Respondent State to regulate and/or limit emissions of GHG in a manner that is consistent with achieving the LTTG of 1.5°C (“the overriding obligation”). This existence of this obligation flows from:

The catastrophic and irreversible consequences climate change will have on the Applicant’s rights if the LTTG of 1.5℃ is exceeded;

The fact that emissions of GHG are the key determinant of temperature increases and the cause of climate harms;

The Respondent States’ roles in materially contributing to temperature increases by producing / permitting emissions within their jurisdictions;

The fact that rapid and deep emissions reductions must be made, and energy transition effected, to avert dangerous climate change; and

The international political and scientific consensus that 1.5℃ is the appropriate LTTG, confirmed by the fact that all the Respondent States, as well as all member States to the Council of Europe, ratified the Paris Agreement.

1. Further, the existence and content of the overriding obligation is supported by, *inter alia*: (i) the objectives and emissions reduction obligations recognised in Article 2 and 4(2) of the UNFCCC,[[127]](#footnote-128) and Articles 2(1)(a) and 4 of the Paris Agreement;[[128]](#footnote-129) (ii) States’ duties to adopt a precautionary approach in the face of serious and irreversible environmental harm;[[129]](#footnote-130) (iii) States’ duties to preserve the natural environment for future generations and ensure the sustainable use of natural resources (“the principle of sustainable development”);[[130]](#footnote-131) (iv) States’ duties to prevent transboundary environmental harm.[[131]](#footnote-132)

To comply with the overriding obligation, the Respondent States must, *inter alia*:

Take domestic mitigation measures to reduce their territorial emissions to a level collectively compatible with 1.5℃ in the sense that if all States took equally ambitious measures pursuant to their fair share of the global emissions reductions the LTTG of 1.5℃ would be achieved.[[132]](#footnote-133)

As per paragraph 7 of the Application, limit the production and use of fossil fuels within their territories by, *inter alia*:

Reducing the extraction of fossil fuels within their territory at a rate consistent with achieving the LTTG of 1.5°C. The Applicant relies upon the UNEP’s 2021 Production Gap Report, which envisages reductions on 2020 levels by 2030 of 69% in coal production, 34% in oil production, and 26% in gas production as providing minimum thresholds for compliance; and

Decommissioning and reducing utilisation of existing fossil fuel installations in the power sector as well as cancelling new installations to align future emissions from the power sector with projections in the LTTG pathways; and

At the very least, not opening, approving, licensing, permitting, investing in and/or planning new coal mines or extensions to coal mines, oil fields, and gas fields beyond those committed to as of 2021.

The above duties are anchored in the premise that the Respondent States must take reasonable steps to urgently regulate and limit emissions in a manner consistent with the LTTG of 1.5°C. The actions outlined above are rooted in the best available science, represent the minimum steps required by the Respondent States to comply with the overriding obligation, and are necessary to ensure the practical and effective protection of the Applicant’s rights.

A failure to take the steps outlined would result in the Respondent States exceeding their margins of appreciation or discretion under Articles 2 and 8. This submission is supported by: (i) the fundamentality of the interests protected under Article 2; (ii) the severity of the interference with the Applicant’s rights if the LTTG of 1.5℃ is surpassed;[[133]](#footnote-134) (iii) the vulnerability of the Applicant;[[134]](#footnote-135) (iv) the weakness of the competing interests properly appreciated;[[135]](#footnote-136) (v) the foreseeability and the Respondent States’ longstanding knowledge of the occurrence and impacts of climate change;[[136]](#footnote-137) and (vi) the international consensus surrounding the LTTG of 1.5℃.[[137]](#footnote-138)

The Respondent States’ continued membership of the ECT, compliance with its provisions and/or failure to negotiate sufficient amendments thereof (or to take any other measure to remove the impediments caused by the ECT on the energy transition), are incompatible with the fulfilment of the overriding obligation to urgently regulate and limit emissions in a manner that is consistent with the LTTG of 1.5℃, and constitute breaches of Articles 2 and 8 of the Convention.

Incompatibility of the ECT, in its current form, with the Convention arises from the protections it affords to fossil fuel investments and infrastructure from State interference and the corresponding risk of “*carbon lock-in”*. Such protections will impede the Respondent States from complying with the overriding obligation in a number of ways:

With regard to territorial emissions, the duty to undertake domestic mitigation measures as per paragraph 45(a) will require the Respondent States to undergo a rapid energy transition away from the combustion of fossil fuels to low-carbon sources of energy. This transition will be delayed or will expose the Respondent States to extensive litigation and liability under the ISDS mechanism where the ECT protects coal-fired or other fossil fuel-based power generation assets in a Respondent State. This has been demonstrated by the ECT claims brought by RWE and Uniper against the Netherlands in relation to its plans to phase out coal-fired generation by 2030 (see paragraph 13 of the Application).

The duty to reduce extraction of fossil fuels as per paragraph 45(b)(i) will conflict with and be impeded by the ECT where it protects fossil fuel reserves which have been invested in with a view to long-term production. This has been demonstrated by Vermilion’s threat of ECT arbitration against France owing to its plans to phase out fossil fuel extraction by 2040 (Summary Note on Regulatory Chill).

With regard to the production of fossil fuels, the duty to not open new coal mines, oil fields or gas fields will conflict with and be impeded by the ECT where it protects investments in fossil fuel exploration and/or the prospective fields where such fields had not been *finally* approved or opened by the Respondent State as of 2021. This risk has been demonstrated by the ISDS proceedings brought by Rockhopper against Italy (see paragraph 13 of the Application).

Even prior to litigation, the investment protections in the ECT and the threat of litigation thereunder imposes a constraint on the Respondent States’ (and other ECT Contracting States’) ability and/or willingness to reduce their territorial emissions and limit the extraction of fossil fuels in their territories in accordance with the overriding obligation. This regulatory chilling effect has already been demonstrated in practice by the examples of authorities in Denmark, the Netherlands, Germany and France diluting ambitions to phase out fossil fuel extraction/production on account of the threat of ECT arbitration (see paragraph 18 of the Application). Given the extent of fossil fuel assets covered by the ECT in the Respondent States, such examples only represent the tip of the iceberg (see paragraph 18 of the Application).

This is therefore an instance where the Respondent States’ commitments under the ECT delay or otherwise impede the fulfilment of their obligations under Article 2 and 8 of the Convention, as per *X v Germany*. This impediment cannot be justified owing to the factors outlined at paragraph 47.

In such circumstances, the Respondent States are under a **duty to take reasonable steps to remove the impediments created by the ECT to the fulfilment of their obligations under the Convention**. Such steps could include, *inter alia*,a number of the following elements:

Negotiating an exemption for climate action to the investor protections in the ECT;

Negotiating an exclusion of the protection of fossil fuel investments within the ECT;

Failing the aforesaid, negotiating an *inter se* agreement to modify or terminate the ECT between signatories;

Withdrawing from the ECT;[[138]](#footnote-139)

Adequately regulating companies within their jurisdiction to prevent them from bringing ECT claims against other States in relation to their climate mitigation measures.

The choice of means between such measures (or others) falls within the margin of appreciation of the Respondent States, insofar as the means chosen are effective in removing the impediment to compliance with the overriding obligation.

In addition, States’ duty to cooperate[[139]](#footnote-140) in the context of climate change requires that they must not act to impede other States’ efforts to reduce their territorial emissions. This requires States to preserve their collective ability to comply with the overriding obligation, as well as to not allow companies subject to their jurisdiction to hamper such efforts, *e.g.* through the use or threat of use of the ECT’s ISDS mechanism against domestic measures implementing the energy transition. A failure to take the steps outlined above would breach this duty of cooperation.

Against this background, the Applicant submits that the Respondent States have failed to take reasonable steps to remove the impediments created by the ECT to the fulfilment of their and other States’ overriding obligation to regulate and limit emissions in a manner consistent with the LTTG of 1.5℃ and are therefore in breach of Articles 2 and 8 of the Convention. As set out at paragraph 19 of the Application, steps taken to renegotiate the terms of the ECT have failed to secure sufficient results and have been ongoing for several years. Given the urgency with which steps must be taken and the principle that such steps must be effective, such efforts to renegotiate the ECT have not discharged their obligations under Articles 2 and 8.

#### Application of the positive procedural obligations in the ECT context

The overriding obligation entails a number of relevant procedural duties, namely:

States must review the compatibility of agreements with the achievement of the LTTG of 1.5℃;[[140]](#footnote-141) and

Information pertaining to and the content of such an assessment is to provided to the public.

As regards the ECT, the Respondent States are in breach of their procedural obligations in that:

They have failed to conduct appropriate assessments as to whether their continued membership of the ECT is compatible with their obligations under the Convention; and

Further, or alternatively, have failed to provide the public with information pertaining to such assessments.[[141]](#footnote-142)

# Conclusion

For the reasons outlined in this Annex and in the Application, the Applicant alleges that the Respondent States have violated his/her rights under Articles 2, 3, 8 and 14 of the Convention. The Applicant accordingly seeks just satisfaction under Article 41 in the form of declaratory relief. The Applicant also claims the costs and expenses of legal proceedings before the Court.

\*

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4. *ibid.*, paras B.1 ff; IPCC, AR6-WGII, Technical Summary, Box TS.2 at TS-8. [↑](#footnote-ref-5)
5. IPCC, AR6-WGI, Summary for Policymakers, §§B.5 and B.2.2; IPCC, AR6-WGII, Summary for Policymakers, §B.3; CIEL and HBS (28 Feb. 2022), pp. 1-6. [↑](#footnote-ref-6)
6. IPCC, AR6-WGII – Impacts of the climate change (annexed quotes). [↑](#footnote-ref-7)
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10. AR6-WGIII, Summary for Policymakers, §B.7; AR6-WGIII, Technical Summary, p. 54; UNEP, Production Gap Report 2021 (Executive Summary) (October 2021). [↑](#footnote-ref-11)
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12. AR6-WGIII, Summary for Policymakers, §C.4; CIEL and HBS (28 Feb. 2022), pp. 6 and 11; CIEL and HBS (21 April 2022), p. 20. [↑](#footnote-ref-13)
13. UNEP, Production Gap Report 2021, Chapter 6 (October 2021), p. 65; UNEP, Production Gap Report 2020 (Executive Summary). [↑](#footnote-ref-14)
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16. Baldon Avocats, Summary Note on Regulatory Chill (citing IPCC, TS AR6-WGIII, p. 120; Chapter 14 AR6-WGIII, p. 81). [↑](#footnote-ref-17)
17. United Nations, Human rights-compatible international investment agreements, A/76/238 (27 July 2021), §20. [↑](#footnote-ref-18)
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44. TNI, “From solar dream to legal nightmare” (31 May 2022), p. 4. [↑](#footnote-ref-45)
45. IISD, Fossil Fuel Disputes, p. 27; SIEPS (Swedish government authority), “Energistadgefördragets nytta för EU” (*The benefits of the ECT for the EU*) - Executive Summary (December 2021), pp. 63-65; EU Parliament, A9-0166/2022, §34. [↑](#footnote-ref-46)
46. Summary Note on Regulatory Chill, p. 1. [↑](#footnote-ref-47)
47. Summary Note on Regulatory Chill, p. 27. [↑](#footnote-ref-48)
48. Summary Note on Regulatory Chill, pp. 25-30. [↑](#footnote-ref-49)
49. Summary Note on Regulatory Chill, pp. 15-20. [↑](#footnote-ref-50)
50. ECT Secretariat, Decision of the Energy Charter Conference (14 Dec. 2021). [↑](#footnote-ref-51)
51. European Parliament, Modernisation of the Energy Charter Treaty – At a Glance (22 April 2022). [↑](#footnote-ref-52)
52. ECT Secretariat, Public Communication on the 11th Negotiation Round of the Modernisation of the ECT (March 2022); Urgewald, Meet the Energy Charter Treaty (2020), p. 5; Euractiv, “Europe edging closer to withdrawal from Energy Charter Treaty”. [↑](#footnote-ref-53)
53. See EU Parliament, A9-0166/2022; Institut Veblen and others, Courrier au Ministre Riester (June 2022). [↑](#footnote-ref-54)
54. CIEL and HBS (28 Feb. 2022), p. 11. [↑](#footnote-ref-55)
55. CIEL and HBS (21 April 2022), p. 21. [↑](#footnote-ref-56)
56. For example, see: Plan B v Secretary of State for Business, Energy and Industrial Strategy [2018] EWHC 1892 (Admin), §49; Verein KlimaSeniorinnen Schweiz and Others v Federal Department of the Environment, Transport, Energy and Communications, Federal Tribunal, 1C\_37/2019 (5 May 2020), §§5.4-5.5. [↑](#footnote-ref-57)
57. *Sejdovic v. Italy* [GC], app. no. 56581/00, 1 March 2006, §46. [↑](#footnote-ref-58)
58. For example: Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy, Case no. 20- 051052SIV-HRET (Supreme Court of Norway, 22 December 2020). [↑](#footnote-ref-59)
59. *Mifsud v. France* [GC], app. no. 57220/00, 11 September 2002, §§15-16; *Horvat v. Croatia*, app. no. 51585/99, 26 July 2001, §44. [↑](#footnote-ref-60)
60. *Pine Valley Developments Ltd and Others v. Ireland*, app. no. 12742/87, 29 November 1991, §47; *McFarlane v. Ireland* [GC], app. no. 31333/06, 10 September 2010, §123. [↑](#footnote-ref-61)
61. *M.N. and Others v. Belgium* [GC], app. no. 3599/18, 5 March 2020, §131. [↑](#footnote-ref-62)
62. *ibid.*, §101. [↑](#footnote-ref-63)
63. *Al-Skeini and Ors v. United Kingdom* [GC], app. no. 55721/07, 7 July 2011, §132. [↑](#footnote-ref-64)
64. For example: *Kovacic and Others v. Slovenia* [GC], app. nos. 44574/98 and ors, 9 October 2003; *Pad and Others v. Turkey*, app. no. 60167/00, 28 June 2007; *Big Brother Watch and Ors v. United Kingdom* [GC], app. nos. 58170/13 and ors, 25 May 2021. [↑](#footnote-ref-65)
65. *Cyprus v. Turkey* [GC], app. no. 25781/94, 10 May 2001, §78. [↑](#footnote-ref-66)
66. The Applicant observes that obligations can be divided and tailored: *Al-Skeini*, §137. Jurisdiction can therefore be established with respect to a limited range of positive obligations in appropriate cases: *Treska v. Albania and Italy*, app. no. 26937/04, 29 June 2006, pp. 12-13. [↑](#footnote-ref-67)
67. The Applicant highlights cases where the inability of a territorial State to protect applicants’ rights without the action of extraterritorial States has been a factor going towards jurisdiction: *Güzelyurtlu and Others v. Cyprus and Turkey* [GC], app. no. 36925/07, 29 January 2019, §§193-194; *Hanan v. Germany* [GC], app. no. 4871/16, 16 February 2021; *Rantsev v. Cyprus and Russia*, app. no. 25965/04, 10 May 2010, §245. [↑](#footnote-ref-68)
68. Cases where causation has been a material factor include: *Andreou v. Turkey*, app. no. 45653/99, 3 June 2008, p. 11; *Stephens v. Malta* (no. 1), no. 11956/07, 14 September 2009, §51; *Ilascu and Others v. Moldova and Russia* [GC], app. no. 48787/99, 8 July 2004, §317; *Kovacic*; *Pad*; *Big Brother*. [↑](#footnote-ref-69)
69. This was endorsed by the UNCRC in *Sacchi et al v. Argentina et al* (2021), Communication No. 107/2019, §10.8-10.12. See also: UNHRC, General Comment No. 36 (2018), UN Doc CCPR/C/GC/36, §63; UNHRC, General Comment No. 24 (2017), UN Doc E/C.12/GC/24, §§26-27; IACHR, *Medio Ambiente y Derechos Humanos* (2017) Advisory Opinion OC-23/17, §§101-103. [↑](#footnote-ref-70)
70. Cases where foreseeability and/or knowledge has been a factor include: *Stephens*, §51; *Kovacic*, p. 55; *Zouboulidis v. Greece* (No.2), app. no. 36963/06, 6 November 2009; *Tarnopolskaya and Others v. Russia*, app. nos. 11093/07 & ors, 28 June 2010. [↑](#footnote-ref-71)
71. Date of adoption of the UNFCCC. [↑](#footnote-ref-72)
72. The foreseeability of climate impacts and its relevance to jurisdiction was recognised in *Sacchi*. [↑](#footnote-ref-73)
73. Contrast to cases involving “instantaneous” acts: *Medvedyev and Others v. France* [GC], app. no. 3394/03, 29 March 2010, §64; *Hirsi Jamaa and Others v. Italy* [GC], app. no. 27765/09, 23 February 2012, §73; *Georgia v. Russia* (II) [GC], app. no. 38263/08, 21 January 2021, §124. [↑](#footnote-ref-74)
74. Contrast to cases involving extraterritorial cases, as per the previous footnote. UNHRC, General Comment 36, CCPR/C/GC/36, §22. [↑](#footnote-ref-75)
75. Pursuant to Article 31(3) of the Vienna Convention on the Law of Treaties, the Court takes into account any relevant rules of international law in interpreting the Convention: Jaloud v. Netherlands [GC], app. no. 47708/08, 20 November 2014, §141. [↑](#footnote-ref-76)
76. *Burden v. United Kingdom* [GC], app. no. 13378/05, 29 April 2008, §33; *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], app. no. 47848/08, 17 July 2014, §96; *Roman Zakharov v. Russia* [GC], app. no. 47143/06, 4 December 2015, §164; *Caron and others v. France*, app. no. 48629/08, 29 June 2010, §1. [↑](#footnote-ref-77)
77. *Brumărescu v. Romania* [GC], app. no. 28342/95, 28 October 1999, §50. [↑](#footnote-ref-78)
78. *Senator Lines GMBH v Austria and Others*, app. no. 56672/00, 10 March 2004, p. 11; *Tauira and others v. France*, app. no. 28204/95 (Commission Decision, 4 December 1995), 131; *Aly Bernard and others v. Luxembourg*, app. no. 29197/95, 29 June 1999, 6; *Segi and others & Gestoras Pro-Amnistia and others v. 15 States of the European Union*, app. nos. 6422/02 and 9916/02, 23 May 2002, 7. [↑](#footnote-ref-79)
79. *Gorraiz Lizarraga and others v. Spain*, app. no. 62543/00, 27 April 2004, §38; Relating to a law punishing homosexual acts, see *Dudgeon v. United Kingdom*, app. no. 7525/76, 22 October 1981, §40-41. [↑](#footnote-ref-80)
80. *Roman Zakharov v. Russia* [GC], app. no. 47143/06, 4 December 2015, §165, citing *Klass and others v Germany*, app. no. 5029/71, 6 September 1978, §36. [↑](#footnote-ref-81)
81. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, §112. [↑](#footnote-ref-82)
82. *Burden v. United Kingdom*, §34; *Tanase v. Moldova* [GC], app. no. 7/08, 27 April 2010, §104; *Sejdic and Finci v. Bosnia and Herzegovina* [GC], app. nos. 27996/06 and 34836/06, 22 December 2009, §28. [↑](#footnote-ref-83)
83. *Taşkin and others v. Turkey*, app. no. 46117/99, 10 November 2004, §113; *Moreno Gomez v. Spain*, app. no. 4143/02, 16 November 2004), §59; *Fadeyeva v. Russia*, app. no. 55723/00, 9 June 2005, §88; *Tătar v. Romania*, app. no. 67021/01, 27 January 2009, §§96-97 and 107; *Dubetska and others v. Ukraine*, app. no. 30499/03, 10 February 2011, §111; *Grimkovskaya v. Ukraine*, app. no. 38182/03, 21 July 2011, §§60-63; *Hardy and Maile v. United Kingdom*, app. no. 31965/07, 14 February 2012, §§190-192. [↑](#footnote-ref-84)
84. UN Human Rights Council, Resolution 10/4 “Human rights and climate change”, UN Doc A/HRC/RES/10/4 (March 2009). [↑](#footnote-ref-85)
85. IPCC, 2018: Summary for Policymakers. Global Warming of 1.5°C, §B.5.2 [↑](#footnote-ref-86)
86. A.3.1, IPCC, 2018: Summary for Policymakers. Global Warming of 1.5°C). [↑](#footnote-ref-87)
87. IPCC, AR6-WGII, Summary for Policymakers, pp. 11 and 13/§§B.1 and B.1.4): “*Human-induced climate change, including more frequent and intense extreme events, has caused widespread adverse impacts and related losses and damages to nature and people*”. [↑](#footnote-ref-88)
88. WHO, “COP26 Special Report on Climate Change and Health, The Health Argument for Climate Action – Business Summary” (2021). [↑](#footnote-ref-89)
89. IPCC, AR6-WGII, Summary for Policymakers, p. 13/§B.1.4). [↑](#footnote-ref-90)
90. See V. Clemens and al., “Report of the intergovernmental panel on climate change: implications for the mental health policy of children and adolescents in Europe—a scoping review” (2020) Eur Child Adolesc Psychiatry; Charlson F, Ali S, Benmarhnia T, et al. “Climate Change and Mental Health: A Scoping Review” (2021) Int J Environ Res Public Health 18(9), 4486. [↑](#footnote-ref-91)
91. European Environment Agency website, Global and European temperatures (18 Nov. 2021), https://www.eea.europa.eu/ims/global-and-european-temperatures [last accessed 17 June 2022]. [↑](#footnote-ref-92)
92. *Jugheli and Others v. Georgia*, app. no. 38342/05, 13 July 2017, §§71-71. [↑](#footnote-ref-93)
93. *Burden v. United Kingdom*; Ta *Tanase v. Moldova*; *Sejdic and Finci v. Bosnia and Herzegovina*. [↑](#footnote-ref-94)
94. IPCC, AR6-WGII, Summary for Policymakers, p. 14. [↑](#footnote-ref-95)
95. *O’Keeffe v. Ireland* [GC], app. no. 35810/09, 28 January 2014, §149. [↑](#footnote-ref-96)
96. See in this regard, the causation test applied by the Court in *Opuz v Turkey*,app. no. 33401/02, 9 June 2009, §136 citing *E & Ors v United Kingdom,* app. no. 33218/96, 26 November 2002, §99; *O’Keeffe v Ireland*, §149. [↑](#footnote-ref-97)
97. By analogy, this test was applied in the context of mesothelioma in *Fairchild v. Glenhaven Funeral Services Ltd* [2002] UKHL 22 (per Lord Bingham, §33). [↑](#footnote-ref-98)
98. Supreme Court of The Netherlands, 12 December 2019, Hoge Raad, ECLI:NL:HR:2019:2006, 19/00135, §5.7.7. [↑](#footnote-ref-99)
99. Court of First Instance of Brussels, Civil Section, 2015/4585/A, 17 June 2021, p. 61. [↑](#footnote-ref-100)
100. Federal Constitutional Court of Germany, Decision of 24 March 2021, No 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, p. 2. [↑](#footnote-ref-101)
101. *Bursa Barosu Başkanlığı and Others v. Turkey*, app. no. 25680/05, 19 June 2018, §128. [↑](#footnote-ref-102)
102. *Tătar v. Romania*, §24. [↑](#footnote-ref-103)
103. *Cordella and others v. Italy*, app. nos. 54414/13 and 54264/15, 29 January 2019, §99-109. [↑](#footnote-ref-104)
104. *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, §105, citing *Konstantin Markin v. Russia* [GC], app. no. 30078/06, 22 March 2012, §89, and the earlier case of *Ireland v. United Kingdom* 18 January 1978, Series A no 25, §154. [↑](#footnote-ref-105)
105. *Siliadin v. France*,app. no. 73316/01, 26 July 2005, §63; *Hirsi Jamaa and Others v. Italy* [GC], app. no. 27765/09, 23 February 2012, §111. [↑](#footnote-ref-106)
106. *Wemhoff v. Germany*, app. no. 2122/64, 27 June 1968, §8; *Saadi v. United Kingdom*, app. no. 13229/03, 29 January 2008, §26; Art. 31(1) of the Vienna Convention. [↑](#footnote-ref-107)
107. *Moreno Gómez v. Spain*, app. no. 4143/02, 16 November 2004, §56; *Dubetska and Others v. Ukraine*, app. no. 30499/03, 10 February 2011, §144. [↑](#footnote-ref-108)
108. *Demir and Baykara v. Turkey*, app. no. 34503/97, 12 November 2008, §154. See also *Al-Adsani v. United Kingdom*, app. no. 35763/97, 21 November 2001; *Siliadin v. France*, app. no. 73316/01, 26 October 2005; *Vilho Eskelinen and Others v. Finland*, app. no. 63235/00, 19 April 2007. [↑](#footnote-ref-109)
109. *Al-Saadoon and Mufdhi v. United Kingdom*, app. no. 61498/08: “*The State is considered to retain liability in respect of treaty commitments subsequent to the entry into force of the Convention*”. [↑](#footnote-ref-110)
110. *Centre for Legal Resources on Behalf of Valentin Câmpeanu v Romania*, §130. See also: *Öneryildiz v Turkey* [GC], app. no. 48939/99, 30 November 2004), §71 referring to *Ercan Bozkurt v Turkey* app. no. 20620/10 (23 June 2015), para. 54. [↑](#footnote-ref-111)
111. *Kolyadenko and Others v Russia*, app. nos. 17423/05 and others, 28 February 2012, §§151, 174-180. See also: *Öneryildiz v Turkey*, §§98-101; *Budayeva and Others v Russia*, app. nos. 15339/02 and others, 20 March 2008, §§147-158. [↑](#footnote-ref-112)
112. *Tătar v. Romania*, §§106-107 and *Cordella and others v Italy*, §157. [↑](#footnote-ref-113)
113. *Öneryıldız v.Turkey*, §98-101; *Kolyadenko and others. v. Russia*, 9 July 2012, §§174-180; *Taşkin and others v. Turkey*, §§107, 111-114. [↑](#footnote-ref-114)
114. *Taşkın and Others v Turkey*, 30 March 2005; *Tătar v. Romania*; *Hardy and Maile v. United Kingdom*, app. no. 31965/07, 14 February 2012; *Guerra and Others v Italy*, app. no. 14967/89 (19 February 1998). [↑](#footnote-ref-115)
115. *Di Sarno and Others v. Italy*, app. no. 30765/08, 10 January 2012, §108. [↑](#footnote-ref-116)
116. *Budayeva and Others v Russia*, §133. [↑](#footnote-ref-117)
117. *Ledyayeva and Others v. Russia*, app. nos. 53157/99 and others, 26 March 2007, §101. See also: *Budayeva*, §128; *Băcilă v Romania*, app. no. 19234/04, 4 October 2010, §§60-61. [↑](#footnote-ref-118)
118. *Öneryildiz v Turkey*, §89; *Tătar v. Romania*, §88; *Budayeva*, §129. [↑](#footnote-ref-119)
119. *Taşkın and Others v Turkey*, 30 March 2005, §118; *Hatton and Others v. United Kingdom*, app. no. 36022/97, 8 July 2003, §104; *Budayeva*, §131. [↑](#footnote-ref-120)
120. *Taskin*, §119; *Hatton*, §128. Including participatory requirements (*Giacomelli v. Italy*, app. no. 59909/00, §83). [↑](#footnote-ref-121)
121. *Tătar*, §§101 and 112. [↑](#footnote-ref-122)
122. *Taskin*, §119; *Tătar*, §88. [↑](#footnote-ref-123)
123. *McCann and Others v United Kingdom* [GC], app. no. 18984/91, 27 September 1995, §147. [↑](#footnote-ref-124)
124. *Öneryildiz v Turkey*, §69; *Giuliani and Gaggio v Italy*, app. no. 23458/02, 24 March 2011, §182. [↑](#footnote-ref-125)
125. *LCB v United Kingdom*, app. no. 23413/94, 9 June 1998, §36. See also: *Ercan Bozkurt v Turkey*, app. no. 20620/10, 23 June 2015, §54. [↑](#footnote-ref-126)
126. *Fadeyeva v. Russia*, §89; *Ledyayeva*, §101; *Powell and Rayner v. United Kingdom*, app. no. 9310/81, 21 February 1990, §41, and *Guerra and Others v Italy*, §58. [↑](#footnote-ref-127)
127. Art. 2 UNFCCC provides for an “ultimate objective” of “*stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*”. It recognises that “[s]*uch a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner*”. Art. 4(2)(a) provides that State Parties “*shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs*.” [↑](#footnote-ref-128)
128. Art. 2(1)(a) provides that it enhances the implementation of the objective of the UNFCCC by stating the temperature goals referred to in §5 of the Application. Article 4(1) provides that in order to achieve the LTTG set out in Article 2(1), “*Parties aim to reach global peaking of greenhouse gas emissions as soon as possible […] and to undertake rapid reductions thereafter in accordance with best available climate science […] and in the context of sustainable development*”. [↑](#footnote-ref-129)
129. *Tătar*, §§109 and 120; Principle 15 of the 1992 Rio Declaration; Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p 10, §135; WTO, Report of the Appellate Body, *European Communities – Measures Concerning Meat and Meat Products (Hormones)* (16 January 1998) WT/DS26/AB/R and WT/DS48/AB/R, §16. [↑](#footnote-ref-130)
130. Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edn, CUP 2018), 218-219. See also: *Legality of the Threat of the Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, §§29, 35; Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015, ITLOS Reports 2015, p 4, §190. [↑](#footnote-ref-131)
131. Principle 2 of the 1992 Rio Declaration; Legality of the Threat of the Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, §29; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, §101; UNHRC, General Comment 36, UN Doc CCPR/C/GC/36. [↑](#footnote-ref-132)
132. The Climate Action Tracker provides an appropriate and reasonable measure of the fair share of a State’s territorial emissions reductions for this purpose. [↑](#footnote-ref-133)
133. *Moreno Gómez*, §60; *Budayeva*, §175; *Jugheli and Others v. Georgia*, §77; *Yevgeniy Dmitriyev v Russia*, app. no. 17840/06, 1 December 2020, §55. [↑](#footnote-ref-134)
134. *Buckley v. United Kingdom*, app. no. 20348/92, 25 September 1996, §§74 and 76. [↑](#footnote-ref-135)
135. *Ledyayeva*, §101; *Dubetska*, §155. [↑](#footnote-ref-136)
136. *Öneryildiz*, §101; *Budayeva*, §157; *Tătar*, §121; *Băcilă*, §68; *Dubetska*, §108. [↑](#footnote-ref-137)
137. *Oluić v. Croatia*, app. no. 61260/08, 20 May 2010, §60; *Tătar*, §95; *Udovičić v. Croatia*, app. no. 27310/09, 24 April 2014, §143. [↑](#footnote-ref-138)
138. In this regard, the Applicant’s highlight the example of Italy, which unilaterally withdrew from the ECT in 2016. [↑](#footnote-ref-139)
139. *Rantsev v. Cyprus and Russia*, §289. [↑](#footnote-ref-140)
140. In a similar vein, the Parliamentary Assembly of the Council of Europe has called upon Member States to “*review all ISDS clauses in international investment agreements that they have entered into, assess their appropriateness and bring them into line with best practices […]*” (Resolution 2151 (2017), para 10.7)). [↑](#footnote-ref-141)
141. See EU Parliament, motion for a resolution: the EU Parliament has expressed its concerns regarding the poor access to the negotiating texts of the ECT modernisation negotiations compared to the negotiations of other treaties. [↑](#footnote-ref-142)