

## The Climate Show

This podcast features leading experts' insights on current climate change research.

[Episode 7. Martin Dietrich Brauch: Climate change and international investment treaties](#)

### Content of the podcast

00:00:04 Linnea Nordlander

Hi and welcome to the Climate Show, a podcast that explores the law and politics of climate change.

This podcast is brought to you by the University of Copenhagen.

00:00:16 Beatriz Martinez

Hi, we are Beatriz Martinez and Linnea Nordlander. And Alessandro Monti and we are your host at the climate show.

00:00:26 Beatriz Martinez

In earlier episodes we covered the latest developments in human rights and climate change litigation, but beyond human rights there are other areas of law that can push climate action.

00:00:35 Alessandro Monti

Definitely in fact, in our project and act we also looked at investment law as another area that can push climate action.

00:00:42 Linnea Nordlander

And for that reason we also have the pleasure of having doctor Martin Brauch with us today. In order to discuss with us how investment law relates. To climate action.

00:00:52 Beatriz Martinez

In our trip to New York so far away now we had the pleasure of meeting Martin during the seminar that we had at NYU and he kindly agreed on recording this interview. There was a great opportunity to meet Martin indeed, and even better.

00:01:09 Alessandro Monti

Martin has also been a guest speaker in the Expert roundtable on the Energy Charter treaty which we just held. So it is very timely now to have this interview with him in this episode when we're going to unpack some of the key challenges for investment law to support climate goals and we will also cover some of the latest developments concerning The Energy Charter treaty.

00:01:33 Beatriz Martinez

And it sounds so very interesting that I have nothing else to say, but vamos.

00:01:49 Alessandro Monti

We're here today with Martin Dietrich Brauch. He's a senior legal and economics researcher at the Columbia Center on Sustainable Investment in New York City, where he conducts economic and legal research, training and advisory work.

He's an expert in investment law and policy, and his main area of focus is extractive industry investments in the context of sustainable development and the Low carbon transition. The link between climate change and international investment law is also the topic we're going to talk about today in our conversation. So Martin welcome to the climate show. It is a pleasure to host you and thank you for finding the time to connect from New York

00:02:28 Martin Brauch

Hi Alessandro. Hi listeners, thank you so much for having me it's a pleasure. To be connecting with you today.

00:02:34 Alessandro Monti

So you've been working on the interaction of climate change and international investment law for many years now. On the surface, there seems to be a very clear distinction between these areas of international law. So why is it important to consider the way in which they interact with each?

00:02:52 Martin Brauch

That's a great question. Thank you so much, Alessandro, so climate change is ultimately an investment problem. Addressing climate change will be an investment problem, and yet you have two separate regimes that attempt to govern those two areas internationally, you have the climate change regime, where countries are negotiating goals and objectives for emissions reductions and at the same time you have an investment law regime that protects foreign investment, which can be both in low carbon technologies in low carbon investment, but it can also be in energy intensive and high emissions investments, so it's really important for the two areas of international law to have a better interface so that international investment flows can really support the achievement of global climate goals.

00:03:47 Alessandro Monti

Indeed, but while. These climate change and international investment law areas are very connected. The link between the two areas is often referred to rather as a clash. What is it that makes it so problematic to reconcile these two international legal regimes?

00:04:03 Martin Brauch

The problem to reconcile the two is precisely because they come from very different standpoints. Very different origins. You have the international investment law regime, which was developed to protect economic interests of foreign investors. And especially in a context of decolonization, and in the context of allowing the transition of former Soviet countries into a market economy and that investment law regime is really geared towards protecting economic interests and at the same time you have the climate change regime which was developed under you know the United Nations Framework Convention on Climate Change, which is a multilateral environmental agreement and it's really about achieving those environmental climate related goals. And involves more negotiations among states in terms of achieving those goals as opposed to the interests that are protected investments laws.

So the problem really with the clash is that one is trying to protect the climate system and stabilize emissions. In a way to prevent dangerous. Panic interference with our climate system. And that's the climate regime. But the investment law regime is not looking at public interest issues such as climate change or other sustainable development goals as well. It's really designed around the protection of these economic interests, which can often be. Can often go against the achievement of climate goals as I was saying before. International investment flows are often about high emissions investments that are protected under the International investment law regime just at the same to the same level as low emissions. Investments are protected So that's why essentially they they clashed or going in different ways.

00:06:07 Alessandro Monti

And there are also some more hidden challenges when we look at these so regimes. In fact, in your work, you have often argued that international investment agreements may give rise to challenges to climate action even before they're invoked in a dispute. This is a phenomenon that is largely known as regulatory chill how do explain exactly what is meant.

00:06:29 Martin Brauch

Absolutely, regulatory chill is a phenomenon that climate related investment arbitration litigation around climate can actually discourage policy action. So, for example, as the governments are being sued by high emissions investments. That or, or they perceive that they might be sued under investment arbitration. They may delay the speeds of climate action, or they may lower their ambition to take climate action because they fear those investment arbitration cases will come their way and ultimately, if those cases arise, we have an even bigger problem because you have governments having to compensate foreign investors for taking public interest, regulatory measures, which is in their right and in their duty to take.

But at the same time just the the mere risk, the mere threat of these lawsuits or international arbitrations can and can act as a discouragement factors for for governments and and this has happened, in fact, for example. When big tobacco companies were using the threats of investment arbitration or actual threats of cases of international arbitration to counter anti tobacco measures taken by governments and the climate change sphere. It's essentially very likely that this will happen also because. High emission investors as we know, fossil fuel companies have a long and proven history.

There are several documentaries out there and more and more research about it. Uhm, demonstrating that fossil fuel companies lobby against climate policy. Climate regulations. There's a high likelihood, in my view that they would resort to the same types of tools, meaning employ regulatory chill and to to counter climate action and in the. And the big issue here is of course no government or it's less likely that a government will be. Be willing to Come out publicly to say I'm being pressured by an investor to change regulation to to reverse regulation to delay regulation to lower the level of ambition and my climate regulation, governance will probably not be so transparent about it. This will most likely happen behind closed doors, so it's very difficult to control regulatory choke and die. And I would even claim to be an expert in this area. There's great research out there that you can check, especially from Kyla Tienhaara. You should definitely read her writings on regulatory chill.

00:09:32 Alessandro Monti

Well, thank you For providing an excellent definition and explaining this complex phenomenon, and now I would like to zoom into one particular investment treaty which is highly considered as problematic from a climate perspective, and you have already written extensively about it, so we're talking about the Energy Charter Treaty. Which is seen often as a prominent example of which challenges international investments rate is composed to climate action.

In your view, what is it exactly about the Energy Charter Treaty that creates more trouble? If you want to climate goals than other international investment agreements?

00:10:11 Martin Brauch

So you're asking me, what is it about the ECT or the energy that creates more Trouble? I think I'll have to dispute the premise of your question. I don't know if there's anything particular about the ECT that makes it more troublesome. I think all international investment agreements that are, as I usually say, climate blind. Or blind to climate circumstances are equally problematic because they allow the protection of investments that are essentially climate destructive, and you know contributing significantly to the rise in emissions. That's essentially messing up with the balance of our climate system globally, it's not just the Energy Charter Treaty I think, especially if you look at the Energy Charter Treaty, the model, the templates based on which it was designed, several other international investment agreements were designed based on the same template.

But I think what draws more attention to the ECT is the fact that energy is actually in the name of the Treaty. And of course, a treaty intended to be an International Energy charter or a charter for the regulation of energy investment internationally should. Be paving the way for the low carbon energy transition, which is a key component of addressing climate change. Most of our emissions come from energy production and use. Uhm, another factor that draws attention to the Energy Charter Treaty is the fact that it's going through a renegotiation that they called modernization.

It's really a lengthy process. It's taken much longer than it was supposed to take. And the results are dubious and in terms of their effectiveness. It's, you know it's being branded as a modernization, but it truly is an international renegotiation of a treaty that depends on unanimity of all the members for any change to be implemented and then followed by ratification by each of those Members so. It's only going to be modernized if everyone agrees that it's going to be modernized, and it's very unclear. As to whether this will actually lead to effective modernization in a way that works for the achievement of climate goals, I'm very skeptical that it will, so I think those are reasons that draw attention to, ECT. But it shouldn't be. And even if the renegotiation is. Highly successful, however we measure that.

We shouldn't stop there because there's a network of over 2000 treaties. Other international investment treaties in force that also have the same flaws identified in the city, and that also deserve the same. Or an even deeper, I should say exercise in reviewing the provisions and ascertaining whether they actually work for the purposes of the Treaty. Do they attract investment? The evidence says, not really. Investment treaties don't attract investment, especially not the type of investment that we need. And this whole network of treaties beyond the ECT should be reviewed in those through that lens.

00:13:37 Alessandro Monti

Yeah, so uh, if I understand it correctly, you say that, the ECT is important, but it's not the only obstacle, let's say, and it's maybe the more evident because it's multilateral, among other reasons. But it's definitely not worth just focusing all the attention on the ECT, but it's important. To look at. The network of. Also bilateral treaties and it's out there and that can be challenging for climate change.

00:14:04 Martin Brauch

That's exactly right.

00:14:05 Alessandro Monti

Yeah, but uh, we can't deny the fact that the city is indeed, uh, dragging a lot of attention and especially very recently also court cases in a new forum. Which is this time the European Court of Human Rights. So in fact, a group of young people from several European countries recently brought a claim, uh, to challenge the ECT and requested the withdrawal of their home states from this treaty. So uhm beside. This case I would like to just briefly hear from you. What do you think about the potential of human rights to support integrating climate change in investment agreements? Which is something we very much focus on in our project. InAct, they were carrying out at the University of Copenhagen.

00:14:56 Martin Brauch

Thank you so much, It's a very interesting question. I think my very first disclaimer must be. That I'm not a human rights litigation expert, but I do have a view about it. I am an international lawyer after all, I think. It's a very useful tool. Human rights litigation domestically as well, but at the international level, as an instrument to trigger changes in international law that are not changing that are not happening otherwise. So, for example, there has been strong campaigning by civil society organizations. Throughout the renegotiation process of the Energy Charter Treaty. Flagging the blatant incompatibility between the Energy Charter Treaty and the investment protection provisions that it has on the one side and then on the other side. The climate change regime internationally, but not only the international one.

Also, the EU's commitments under the European. Uhm renewal or you know the. Climate change regulations within the EU there has been so much pressure on governments to withdraw from the Energy Charter Treaty because of that conflict, and because essentially it doesn't advance EU interests and at the same time the EU is proposing alternatives to negotiations. Sort of trying to work around the provisions, all dependent on as I mentioned. Agreement by other States and then ratification. Meanwhile, civil society Europeans are waiting for the rules of the game to be changed and. This is where I think human rights litigation. Litigation generally can play a massive role in actually setting the institutions on a course to respond to the concerns of citizens. It's not only litigation, of course, they should be actively calling their representatives in Parliament. Because they are also Important in setting the policy scene for the country calling their elected representatives as well, which ultimately are leading from the executive branch. These these negotiations, so I think, yeah, I would agree with the importance of human rights litigation, but I would also flag citizens should go. To all branches of government, to parliamentarians who they elected when they elected and. Executive branch members just as well to show the importance that withdrawal from the ECT or renegotiation in a way that works for climate action to actually happen.

00:17:44 Alessandro Monti

Yeah, absolutely. So this actually leads us to our next question, which is about looking forward. What are some of the possible options to reform to change the investment reinvestment low regime and make it more compatible with climate goals? So court action as you said, it's one of the ways, but it's not the only way to go about it. It's also possible to indeed work with, uh, changing and reforming the existing investments treaties. And what would you say are some of the options out there? And what are the promises and pitfalls of These various reform proposals.

00:18:25 Martin Brauch

To me this is a key question. The climate focus reform proposals and I've written about this. You're welcome to read my article, and this is essentially the the guideline that I'm going to use here for my answer. It's interesting to see around there the reform proposals of the Energy Charter Treaty, as well as other international investment treaties. Needs to bring them in line with climate goals. You see proposals, for example, to train arbitrators in climate science or change how damages are calculated to avoid, you know lost profits or calculating damages based on assets that are going to be stranded in the future. Other proposals advance integrating climate change. Carve outs or exceptions or creating a right to regulate clause or embedding one into the Treaty, which, as an international international lawyer always, you know, makes me kind of smile ironically because. The rights of the states to regulate isn't in here. Rights to any state based on sovereignty. It doesn't have to be written into a treaty for the states to be to have a rights to regulate. It has a duty to regulate in the public interest and the way these treaties have been interpreted so far by private arbitrators. Often you know behind closed doors. Has moved states as a response measure to actually think of changing their treaties to embed these types of provisions to safeguard something that they have had always before. You know, even entering into these treaties near blows mind. But the the bottom line of all these Reform proposals is that their fixes. At the margins, they're really tweaks that won't fix the major issues of the international investment law and arbitration regime. And and I'm also invariably favorable in favor of not settling for less when we can do more, and we can do more.

I think there are three main reasons. Why we shouldn't go for planet specific reform of treaties? First of all, the climate issue is far from being the sole issue with the investment regime. There are several other concerns with respect to this regime. This affects the right to regulate and effects encroaches on state policy space in other public interest areas, including protection of human rights, environmental goals other than climate change and the pursuit of sustainable development. Several other areas. It's not only climate, so if we should fix it or attempt to fix it.

Our planet. We would have to have several fixes here and there for different areas, and that's obviously not optimal. I mean, we can discuss tobacco. We can discuss climate. We can maybe discuss public health in light of the pandemic and so on and so forth. And then we're going to have this massive regime full of exceptions. To me, that just signals that the core of the regime is malfunctioning, so it begs for broader reform.

The second point, I think that supports a move away from the regime and away from and tweaking at the margins is the fact that there is inconclusive evidence that these treaties actually perform on the benefits that they promise. There's no quality. There's no evidence that they improve the quality or the quantity of foreign direct investment. There's no empirical evidence, conclusive, empirical evidence that they depoliticize conflicts that they promote good governance that they strengthen the rule of law. If anything, there's quite a bit of evidence to the contrary.

So if we're investing. A pun intended time and energy, another pun intended in reforming this regime, uhm? And putting so much effort into it. But really, what are the benefits that we're going to get out of it? Why are we putting so much time and energy and investment and effort into something that doesn't have proven benefits?

I think it's a in at the same time, the costs are substantially high for. Policy space on one hand, just by the threats of arbitration, but even. Actual costs out of pocket of governments and ultimately of taxpayers who have to pay these damages awards to foreign investors. You know, in favor of whom these investment tribunals find. So for me, there's really little to support reforming a regime that is not serving its benefits. We need to think of something that actually works. For the goals that we want to achieve globally and and I think. In the climate context specifically. There's a third reason given the. You know the threat of arbitration, given that we're already seeing high profile cases initiated by investors and fossil fuel sectors, et cetera. And at the same time we have a climate emergency going. Why are we, you know, trying to tweak it in the margins? And see if we can fix the investment regime while it's actually hurting our climate. Our climate goals live like it's it's happening right now. We shouldn't wait to see whether we can do this. We should be proactive in. Re framing the whole paradigm in the whole system in a way that works for climate goals.

00:24:28 Alessandro Monti

Well, there is a lot of food for thoughts there and definitely you go for an approach that is beyond climate change. Of course, climate change is part of the picture in reforming and the investment law regime, but it's only one of the aspects. An important one, but not the only one and to conclude, I would say your point is that.

Every form of international investment law should be focusing on reclaiming the public interest of it, and, uh, making essential challenges which are related to the SDG's of course, and in different areas. At the core of this regime and aligned with the 21st century needs. Is that essentially your message?

00:25:13 Martin Brauch

Yeah, that's that's essentially the message I think we need a deep realignment of priorities here and in my view. The best way to do this is actually or actually starts necessarily by moving away from what we have now, which doesn't work and which could well couldn't work.

Better if we had the appropriate international law tools. So I'm a passionate advocate for terminating existing investment protection treaties, or withdrawing from them, or withdrawing consent to international arbitration under these treaties, and not negotiating committing not to negotiate new investment treaties that also fail to align with climate. As well as other sustainable development objectives, this is also a position that we all hold here at the global Center on Sustainable Investment. We absolutely need to move away from regimes that don't promote and often hinder sustainable development.

00:26:17 Alessandro Monti

So you argue that states should essentially move away from the existing regime of international investment treaties, because this essentially puts profit above people and planet. But if this was to



happen, what is in your view, the best way to then comprehensively reform and provide an alternative? To the current investment or regime?

00:26:39 Martin Brauch

Thanks Alessandro, this is actually the most exciting question right because we have to look beyond what exists to really think of conceive of an international regime that is creative that is useful for states to achieve their sustainable development goals.

And this is the form part right, this is really thinking about how international law can contribute to achieving the goals that really matter. Climate goals, SDG's. We at CSI are currently doing research on investment governance treaties and what types of general and specific obligations they could contain to really govern investment. Foreign investment flows in line with the tags including climate action.

Just a reminder. Current investment treaties don't really govern investment in a strict sense, right? They only protect economic interests of those investors. Investors don't have obligations. Sometimes they have an obligation to comply with domestic law. Again, you don't need a treaty to say a foreign investor needs to comply with domestic law. So new treaties focused on investment governance for sustainable investment and climate aligned investments could include international cooperation mechanisms to help navigate the challenges that arise from international investment and governing those investments, these treaties could strengthen domestic, administrative and judicial systems. They could also foster cooperation in very specific areas that will be key to the achievement of climate goals. So for example, countries needs to ramp up research and development to find new technologies that will help us decarbonize the treaties that you know investment governance. Treaties could also. To cover financing mechanisms for climate aligned investments, in addition to R&D, in addition to two technological transfer and cooperation treaties could cover specific sectors that really matter for the achievement of these goals, including energy efficiency. Renewable electricity. And the various from various sources, hydro. When solar or geothermal, depending on the region you are, treaties could really big into the specificity's that will be needed. Green hydrogen, other green fuels, batteries, and other storage solutions. Increasing rates of recycling and how we can support markets to do that. And also very important. Topic that investment governance treaties should cover is investment in climate resilient infrastructure. That's ready for the already unavoidable changes that our climate is going to experience is already experiencing.

We need to build that infrastructure and investment once again will be also needed for resilience and adaptation. All of those topics could be covered in a regime that is actually forward-looking and in line with climate goals and another important element I think to just wrap up is to deal with. The phase out of fossil fuel production of fossil fuel incentives such as subsidies, it's about time we have a treaty to do that and it should be a matter of investment. We should stop investing in fossil fuel exploration and exploitation. The International Energy Agency already indicates in its pathway to net zero, that no new exploration of fossil fuels is needed. To achieve net 0 by 2050, in line with the Paris Agreement, so we need to get our investment governance regime in line with those findings, and I think. A little bit to go back to your question about human rights litigation. I think it's important that this new regime is open and participatory. Uh, because the current one is not right, you have. Uh renegotiation, for example of the CT and stakeholders don't even know what's happening behind closed doors. And then, if there's a

dispute. Sometimes even the existence of the dispute is not public, let alone pleadings, let alone the arguments or the damages that are being claimed, etc.

So there has to be more transparency and opportunities for stakeholder participation in decision making and in. This big resolution as well, and so treaties should create climate justice and just transition mechanisms to allow for more participation and also supports the ultimate beneficiaries of all treaties. You know, people, workers, taxpayers to really face this new moment.

In our world, which is the energy transition we will, we need to prepare that and we need to bring everyone on board. And protect the rights of interests of those who really matter. Those who are most affected by the transition. Those who are most vulnerable also to climate change. An investment governance regime that neglects those people you know the most important actors here is flawed by nature, and this is where. International law could really contribute to a redesign of investment governance.

00:32:10 Alessandro Monti

Yeah, well, we we hope that international law will perform this function. And definitely there is a long list of items on the agenda for policymakers enough to keep them busy for the next couple of years at least if they want to actually do this. More structural reform of investments relates that you suggest. Well, on this note, thank you very much. Martin, for today's interview. It has been an immense pleasure to have you here with us at the climate shop and we're looking forward of course to continue in our collaboration on this topic and hopefully see you back in Copenhagen or in the US very soon.

00:32:49 Speaker 5

Thank you very much, Alexander once again and to all the listeners it's been a pleasure to to be here with you today. I am very passionate about this topic and I assume we can hear it in my voice, I'm very happy.

00:33:08 Alessandro Monti

Thank you for listening to this episode. If you want to read Martin's recent post, climate action needs investment governance, not investment protection and arbitration. Check out the link in the show notes. You can also find the link. To our research project EnAct there. Stay tuned for our next episode.