

STRANDED FOSSIL FUEL ASSETS AND INTERNATIONAL INVESTMENT LAW: COMPENSATION, LEGITIMATE EXPECTATIONS AND THE POLICE POWERS OF THE STATE

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ABSTRACT

Climate mitigation may leave large fossil fuel reserves in the ground. If a State bans extraction to meet its climate obligations, the affected investor may claim that its reserves are stranded assets and that the State must pay. This article asks whether investment treaty law supports that claim. It examines expropriation, legitimate expectations and the police powers doctrine. It reviews arbitral decisions from *Tecmed* and *Saluka* to *Rockhopper*, *Eco Oro* and *Westmoreland*. The article argues that the protected asset is the legal right that the State granted and not the reserve. Claims tend to succeed when the State made a specific promise and then acted without due process. Claims tend to fail when the State acted in good faith through a general and non-discriminatory measure.

Keywords: Stranded assets; fossil fuels; expropriation; legitimate expectations; police powers; Energy Charter Treaty

1. INTRODUCTION

The world holds more fossil fuel than the climate can safely absorb. About a third of global oil reserves, half of gas reserves and over 80 per cent of coal reserves must stay unused if warming is to stay below 2°C.¹ A later study finds that 58 per cent of oil and fossil methane gas and 89 per cent of coal must stay in the ground to give an even chance of limiting warming to 1.5°C.² The International Energy Agency has said that a net zero pathway needs no new oil and gas fields beyond those already committed.³ Reserves that cannot be produced are often called stranded assets. The term describes assets that lose value before the end of their expected life because of changes in law, markets or technology.⁴

Stranding has many causes. Falling prices can strand reserves but that is ordinary commercial risk. This article deals with a State that bans extraction or revokes a licence to meet its climate obligations. The investor then says that its reserves are worthless because of that measure. If a treaty links its home State and the host State, the investor may sue for compensation before an arbitral tribunal. Such treaties protect against expropriation without compensation and require fair and equitable treatment.⁵ More than one thousand treaty-based disputes are known and many concern extractive industries.⁶ Scholars warn that such claims could raise the cost of climate action.⁷

The article makes three arguments. First, the reserve is not the protected asset. The State usually owns the resource and the investor holds a right to exploit it. Second, tribunals find liability when the State gave specific assurances and then acted arbitrarily or without due process. They rarely find liability when a State adopts a general climate measure in good faith. Third, the risk depends on treaty wording, jurisdiction and quantum as much as on liability. The article states the position as at September 2026.

¹ Christophe McGlade and Paul Ekins, 'The Geographical Distribution of Fossil Fuels Unused When Limiting Global Warming to 2°C' (2015) 517 Nature 187.

² Dan Welsby and others, 'Unextractable Fossil Fuels in a 1.5°C World' (2021) 597 Nature 230.

³ International Energy Agency, *Net Zero by 2050: A Roadmap for the Global Energy Sector* (IEA 2021).

⁴ Carbon Tracker Initiative, *Unburnable Carbon: Are the World's Financial Markets Carrying a Carbon Bubble?* (2011); Ben Caldecott (ed), *Stranded Assets and the Environment: Risk, Resilience and Opportunity* (Routledge 2017); Gregor Semieniuk and others, 'Stranded Fossil-Fuel Assets Translate to Major Losses for Investors in Advanced Economies' (2022) 12 Nature Climate Change 532.

⁵ Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 (ECT) arts 10(1) and 13.

⁶ UNCTAD, 'Investment Dispute Settlement Navigator' (UNCTAD Investment Policy Hub) <<https://investmentpolicy.unctad.org/investment-dispute-settlement>> accessed 29 September 2026.

⁷ Kyla Tienhaara and Lorenzo Cotula, 'Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets' (IIED 2020); Kyla Tienhaara and others, 'Investor-State Disputes Threaten the Global Green Energy Transition' (2022) 376 Science 701.

2. THE LEGAL SETTING

2.1. *Climate Obligations of States*

States have accepted binding climate duties. The Paris Agreement aims to hold warming well below 2°C and to pursue efforts to limit it to 1.5°C.⁸ Each party must maintain successive nationally determined contributions.⁹ The UN Framework Convention on Climate Change requires parties to prevent dangerous interference with the climate system.¹⁰

In July 2025 the International Court of Justice gave a unanimous advisory opinion on climate change.¹¹ It said that States must take ambitious mitigation measures in line with the best available science.¹² It also said that a State may commit a wrongful act if it fails to protect the climate system. Fossil fuel production, exploration licences and subsidies were named as conduct that may qualify.¹³ The International Tribunal for the Law of the Sea held in 2024 that greenhouse gas emissions can amount to marine pollution.¹⁴

The opinion does not decide any investment dispute. Yet a tribunal must read investment treaties with general international law in mind. Article 31(3)(c) of the Vienna Convention on the Law of Treaties requires an interpreter to take account of relevant rules of international law.¹⁵ The Court has also said that new environmental norms must be considered when States continue old activities.¹⁶ A State that bans extraction can therefore say that it complies with international law. That law does not say that the State may act without paying.

⁸ Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) (2016) 55 ILM 740 art 2(1)(a).

⁹ Paris Agreement (n 8) art 4(2).

¹⁰ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 art 2.

¹¹ *Obligations of States in respect of Climate Change* (Advisory Opinion) ICJ General List No 187 (23 July 2025) (*Climate Change Advisory Opinion*).

¹² Lukas Schaugg, Natalie Jones and Jeffrey Qi, 'Historic International Court of Justice Opinion Confirms States' Climate Obligations' (IISD, 28 July 2025) <<https://www.iisd.org/articles/deep-dive/icj-advisory-opinion-climate-change>> accessed 29 September 2026.

¹³ *Climate Change Advisory Opinion* (n 11); Herbert Smith Freehills Kramer, 'Defining State Obligations in a Warming World: The ICJ's Advisory Opinion on Climate Change' (22 August 2025) <<https://www.hsfkramer.com/notes/publicinternationallaw/2025-posts/defining-state-obligations-in-a-warming-world>> accessed 29 September 2026.

¹⁴ *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (Advisory Opinion) ITLOS Case No 31 (21 May 2024).

¹⁵ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31(3)(c).

¹⁶ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, para 140; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para 204.

2.2. *Investor Rights and the Meaning of Stranding*

Most States own the oil, gas and coal in the ground. The principle of permanent sovereignty over natural resources supports this.¹⁷ An investor usually holds a licence, a concession or a production sharing contract. The protected asset is therefore the right and not the reserve. A tribunal asks what right the investor held, what the State did to it and what loss followed.¹⁸ The reserve helps to value the right but is not the property that the treaty protects.

Three treaty groups matter. The Energy Charter Treaty (ECT) protects energy investments and is the source of most fossil fuel claims in Europe.¹⁹ NAFTA and the legacy regime in Annex 14-C of the USMCA produced claims against Canada and the United States.²⁰ Under the ECT, protection for investments made before a withdrawal continues for twenty years.²¹ Italy had left the ECT when Rockhopper filed its claim and the claim still went ahead under this clause.²²

3. EXPROPRIATION AND COMPENSATION

3.1. *The Test*

Treaties forbid expropriation unless it serves a public purpose, is non-discriminatory, follows due process and comes with prompt compensation.²³ Expropriation may be indirect. A State may take an investment without taking title if it deprives the owner of substantially all of its use or value.²⁴ Most tribunals look mainly at the effect of the measure but some also weigh its purpose.²⁵

The line between a compensable taking and a non-compensable regulation is the central issue. The *Feldman* tribunal said that not every business difficulty of a foreign investor amounts to

¹⁷ UNGA Res 1803 (XVII) 'Permanent Sovereignty over Natural Resources' (14 December 1962).

¹⁸ Zachary Douglas, *The International Law of Investment Claims* (CUP 2009); Jorge E Viñuales, *Foreign Investment and the Environment in International Law* (CUP 2012).

¹⁹ ECT (n 5).

²⁰ North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289 and 605; Agreement between the United States of America, the United Mexican States and Canada (adopted 30 November 2018, entered into force 1 July 2020) annex 14-C.

²¹ ECT (n 5) art 47(3).

²² 'Falklands' Rockhopper 200 million Euros award ruling which Italy is working to annul' (MercoPress, 2 November 2022) <<https://en.mercopress.com/2022/11/02/falklands-rockhopper-200-million-euros-award-ruling-which-italy-is-working-to-annul>> accessed 29 September 2026.

²³ ECT (n 5) art 13(1); NAFTA (n 20) art 1110.

²⁴ *Metalclad Corporation v United Mexican States* (Award) ICSID Case No ARB(AF)/97/1 (30 August 2000) para 103; *Técnicas Medioambientales Tecmed SA v United Mexican States* (Award) ICSID Case No ARB(AF)/00/2 (29 May 2003) para 116.

²⁵ *Tecmed* (n 24) para 122; Katia Yannaca-Small, 'Indirect Expropriation and the Right to Regulate in International Investment Law' (OECD Working Papers on International Investment 2004/4); Ursula Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State' (2007) 8 *Journal of World Investment & Trade* 717.

expropriation.²⁶ The *Methanex* tribunal held that a non-discriminatory public purpose regulation made with due process is not expropriatory unless the State gave specific commitments not to regulate.²⁷ Later tribunals follow this approach.²⁸

3.2. *Licences, Permits and Unextracted Reserves*

The kind of State act shapes the result. A ban that ends all extraction is the strongest case for an investor. A refusal of a licence not yet granted is weaker because the investor has no vested right to it. In every case the investor must show that it lost substantially all the value of its investment.²⁹

Lone Pine concerned a revocation. Québec ended oil and gas activity under the St Lawrence River and cancelled the permit of the claimant's Canadian subsidiary. In 2022 the tribunal held that there was no expropriation because the claimant kept other rights.³⁰ A majority also rejected the minimum standard claim and one arbitrator dissented in part.³¹

Rockhopper went the other way. Italy re-introduced a ban on oil and gas activity within twelve miles of its coast in 2015. Rockhopper had applied for the Ombrina Mare concession before the ban and Italy never granted it. The tribunal held that Italy breached the ECT and awarded about EUR 190 million with interest.³² It stressed that the award passed no judgment on the ban's environmental aims.³³ An ICSID committee annulled the award on 2 June 2025 because the investor's arbitrator had failed to disclose a past criminal proceeding brought by Italy.³⁴

²⁶ *Marvin Roy Feldman Karpa v United Mexican States* (Award) ICSID Case No ARB(AF)/99/1 (16 December 2002) para 112.

²⁷ *Methanex Corporation v United States of America* (Final Award) UNCITRAL (3 August 2005) pt IV ch D para 7.

²⁸ *Saluka Investments BV v Czech Republic* (Partial Award) UNCITRAL (17 March 2006) para 255; *Chemtura Corporation v Canada* (Award) UNCITRAL (2 August 2010) para 266.

²⁹ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012).

³⁰ *Lone Pine Resources Inc v Canada* (Final Award) ICSID Case No UNCT/15/2 (21 November 2022); 'Lone Pine v Canada' (Sabin Center for Climate Change Law, Climate Litigation Database) <<https://climatecasechart.com/non-us-case/lone-pine-v-canada/>> accessed 29 September 2026.

³¹ *Lone Pine* (n 30), Partial Dissenting Opinion of David R Haigh.

³² *Rockhopper Italia SpA, Rockhopper Mediterranean Ltd and Rockhopper Exploration Plc v Italian Republic* (Award) ICSID Case No ARB/17/14 (23 August 2022); 'Rockhopper v Italy' (Sabin Center for Climate Change Law, Climate Litigation Database) <https://www.climatecasechart.com/document/rockhopper-v-italy_bfca> accessed 29 September 2026.

³³ *Rockhopper* (n 32).

³⁴ *Rockhopper Italia SpA, Rockhopper Mediterranean Ltd and Rockhopper Exploration Plc v Italian Republic* (Decision on Annulment) ICSID Case No ARB/17/14 (2 June 2025); 'The Rockhopper Annulment: ICSID Procedural Integrity and the ECT' (Cambridge International Law Journal, 15 June 2025) <<https://cilj.co.uk/2025/06/15/the-rockhopper-annulment-icsid-procedural-integrity-and-the-ect/>> accessed 29 September 2026.

The committee did not rule on the merits. Rockhopper has said that it will resubmit its claim.³⁵ The case therefore remains open.

Ruby River may become the next leading case. The claimant planned a liquefied natural gas terminal in Québec. It says that the refusal of authorisation in 2022 was arbitrary and discriminatory and seeks at least USD 20 billion.³⁶ Canada contests jurisdiction and liability and no award has issued.³⁷

3.3. Coal Phase-Outs

Coal phase-outs offer a parallel line of cases. Westmoreland complained that Alberta paid transition money to Canadian generators but not to it after announcing its coal power phase-out. Two NAFTA tribunals dismissed its claims in 2022 and 2024 on grounds of standing, timing and the lack of a legacy investment.³⁸ The Dutch coal phase-out led RWE and Uniper to bring ECT claims. Both later discontinued them.³⁹ Germany settled with the operators of coal and nuclear plants by paying compensation.⁴⁰ Many claims therefore fail before the merits. Where they reach the merits, the outcome turns on the State's dealings with the investor and not on the climate purpose of the measure.

³⁵ Rockhopper Exploration plc, 'Italy' <<https://rockhopperexploration.co.uk/operations/italy/>> accessed 29 September 2026; 'Rockhopper v Italy' (UNCTAD Investment Policy Hub) <<https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/800/rockhopper-v-italy>> accessed 29 September 2026.

³⁶ *Ruby River Capital LLC v Canada* ICSID Case No ARB/23/5, Request for Arbitration (17 February 2023); Canadian Centre for Policy Alternatives, 'Toxic Legacy' (28 March 2025) <<https://www.policyalternatives.ca/news-research/toxic-legacy/>> accessed 29 September 2026.

³⁷ Global Affairs Canada, 'Ruby River Capital LLC v Canada' <https://www.international.gc.ca/trade-commerce/trade_topics-domaines_commerce/disp-diff/ruby-river-canada.aspx?lang=eng> accessed 29 September 2026; 'Ruby River Capital v Canada' (Investment Arbitration Reporter) <<https://www.iareporter.com/arbitration-cases/ruby-river-capital-v-canada/>> accessed 29 September 2026.

³⁸ *Westmoreland Mining Holdings LLC v Canada* (Award) ICSID Case No UNCT/20/3 (31 January 2022) para 252; *Westmoreland Coal Company v Canada* (Award) ICSID Case No UNCT/23/2 (17 December 2024); Global Affairs Canada, 'Westmoreland Coal Company v Government of Canada (2022)' <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/westmoreland-company.aspx?lang=eng>> accessed 29 September 2026.

³⁹ *Uniper SE, Uniper Benelux Holding BV and Uniper Benelux NV v Kingdom of the Netherlands* (Order Taking Note of the Discontinuance of the Proceedings and Decision on Costs) ICSID Case No ARB/21/22 (17 March 2023); *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands* (Order Taking Note of the Discontinuance of the Proceeding and Decision on Costs) ICSID Case No ARB/21/4 (12 January 2024); 'High-Profile Coal Phase-Out Intra-EU Arbitration Discontinued' (Investment Treaty News, 13 January 2024) <<https://www.iisd.org/itn/2024/01/13/high-profile-coal-phase-out-intra-eu-arbitration-discontinued/>> accessed 29 September 2026; 'Uniper v Netherlands' (Sabin Center for Climate Change Law, Climate Litigation Database) <<https://climatecasechart.com/non-us-case/uniper-v-netherlands/>> accessed 29 September 2026.

⁴⁰ 'The Netherlands Coal Phase-Out and the Resulting (RWE and Uniper) ICSID Arbitrations' (Kluwer Arbitration Blog) <<https://legalblogs.wolterskluwer.com/arbitration-blog/the-netherlands-coal-phase-out-and-the-resulting-rwe-and-uniper-icsid-arbitrations/>> accessed 29 September 2026; Gesetz zur Reduzierung und zur Beendigung der Kohleverstromung (Kohleverstromungsbeendigungsgesetz) 2020 BGBl I 1818.

A general climate ban is unlikely to expropriate the reserve because the State owns it. It may expropriate the investor's right if it removes substantially all value from that right and no police powers defence applies. Article 13 of the ECT then makes prompt, adequate and effective compensation a condition of lawfulness.⁴¹

4. FAIR AND EQUITABLE TREATMENT AND LEGITIMATE EXPECTATIONS

4.1. The Standard

Fair and equitable treatment is the most invoked standard in investment arbitration.⁴² Tribunals refer to legitimate expectations, transparency, due process and freedom from arbitrariness.⁴³ The *Tecmed* tribunal said that the investor expects the State to act consistently and without ambiguity.⁴⁴ The *Saluka* tribunal took a narrower path. It said that the right to regulate must be balanced against investor expectations and that only reasonable and justifiable expectations count.⁴⁵

Tribunals add two points. An investor cannot expect the legal environment to stay unchanged.⁴⁶ Expectations that rest on specific assurances weigh more than those that rest on general laws.⁴⁷ Article 10(1) of the ECT promises stable, equitable, favourable and transparent conditions.⁴⁸ The NAFTA minimum standard is narrower and *Glamis* set a high bar for breach.⁴⁹ The CETA now says that a tribunal may consider whether a specific representation created a legitimate expectation.⁵⁰

The Spanish renewable energy cases show the standard at work. The *Charanne* tribunal held that investors had no right to a frozen regime without a specific commitment.⁵¹ The tribunals in *Eiser*, *Novenergia* and *Antin* found a breach because Spain changed a regime designed to

⁴¹ ECT (n 5) art 13(1).

⁴² Dolzer and Schreuer (n 29); Roland Klager, 'Fair and Equitable Treatment' in *International Investment Law* (CUP 2011).

⁴³ Kenneth J Vandeveld, 'A Unified Theory of Fair and Equitable Treatment' (2010) 43 NYU Journal of International Law and Politics 43.

⁴⁴ *Tecmed* (n 24) para 154.

⁴⁵ *Saluka* (n 28) paras 304–306.

⁴⁶ *Parkerings-Compagniet AS v Lithuania* (Award) ICSID Case No ARB/05/8 (11 September 2007) para 332.

⁴⁷ *Thunderbird Gaming Corporation v United Mexican States* (Award) UNCITRAL (26 January 2006) para 147; *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador* (Award) ICSID Case No ARB/04/19 (18 August 2008) para 340.

⁴⁸ ECT (n 5) art 10(1).

⁴⁹ *Glamis Gold Ltd v United States of America* (Award) UNCITRAL (8 June 2009); *Waste Management Inc v United Mexican States (No 2)* (Award) ICSID Case No ARB(AF)/00/3 (30 April 2004) para 98.

⁵⁰ Comprehensive Economic and Trade Agreement between Canada and the European Union [2017] OJ L11/23 art 8.10(4).

⁵¹ *Charanne BV and Construction Investments SARL v Spain* (Final Award) SCC Arbitration V 062/2012 (21 January 2016).

give long term stability.⁵² In *Aminoil* the tribunal read a stabilisation clause narrowly and held that it did not by itself bar a nationalisation.⁵³

4.2. Applying the Standard to Fossil Fuel Investors

Three features weaken the claim of a fossil fuel investor. The first is foreseeability. A reasonable oil and gas investor after 1992 knew that climate policy could limit extraction. The risk has been concrete since the Paris Agreement in 2015 and the carbon bubble argument has been public since 2011.⁵⁴ The International Court of Justice has now confirmed that climate duties bind States under treaty and customary law.⁵⁵ An expectation of unlimited extraction until depletion is therefore unlikely to be reasonable for a recent investment.⁵⁶ The second is the lack of a vested right, since many claims concern licences that were never granted. The third is regulatory intensity, since oil and gas is a heavily regulated sector.

An investor may answer that the State encouraged the investment. The claimant in *Ruby River* says that Québec and Canada supported its projects before they refused authorisation.⁵⁷ A NAFTA claim over the Keystone XL pipeline failed in July 2024 because the permit revocation came after NAFTA had ended.⁵⁸ The investor had claimed more than USD 15 billion.⁵⁹ Zeph Investments has a claim of about A\$41 billion over Queensland coal permits that was still pending in March 2026. An earlier Zeph claim failed in 2025 because Zeph had contributed nothing of value to its investment.⁶⁰

⁵² *Eiser Infrastructure Ltd and Energia Solar Luxembourg SARL v Kingdom of Spain* (Award) ICSID Case No ARB/13/36 (4 May 2017); *NovEnergia II – Energy & Environment (SCA) SICAR v Kingdom of Spain* (Final Award) SCC Arbitration V 2015/063 (15 February 2018); *Antin Infrastructure Services Luxembourg SARL and Antin Energia Termosolar BV v Kingdom of Spain* (Award) ICSID Case No ARB/13/31 (15 June 2018).

⁵³ *Kuwait v American Independent Oil Co (Aminoil)* (Award) (1982) 21 ILM 976.

⁵⁴ Carbon Tracker Initiative (n 4).

⁵⁵ *Climate Change Advisory Opinion* (n 11).

⁵⁶ *Saluka* (n 28) para 304; *Parkerings* (n 46) para 332.

⁵⁷ *Ruby River* (n 36).

⁵⁸ *TC Energy Corporation and TransCanada Pipelines Limited v United States of America* (Award) ICSID Case No ARB/21/63 (12 July 2024); ‘International Tribunal Recalibrates “Principle of Consistency” in Keystone Pipeline Case’ (Taft Law Bulletin) <<https://www.taftlaw.com/news-events/law-bulletins/international-tribunal-recalibrates-principle-of-consistency-in-keystone-pipeline-case/>> accessed 29 September 2026.

⁵⁹ TC Energy, ‘TC Energy disappointed in Tribunal’s ruling that NAFTA claim cannot proceed’ (16 July 2024) <<https://www.tcenergy.com/newsroom/statements/2024-07-16-tcenergy-disappointed-in-tribunals-ruling-that-nafta-claim-cannot-proceed/>> accessed 29 September 2026.

⁶⁰ *Zeph Investments Pte Ltd v Commonwealth of Australia* (Award) PCA Case No 2023-40 (26 September 2025); Attorney-General’s Department (Australia), ‘International Trade and Investment Law’ <<https://www.ag.gov.au/international-relations/international-law/international-trade-law>> accessed 29 September 2026; ‘Zeph Investments v Australia: Corporate Restructure Leads to Dismissal of AANZFTA USD 198 bn Claim’ (Kluwer Arbitration Blog) <<https://legalblogs.wolterskluwer.com/arbitration-blog/zeph-investments-v-australia-corporate-restructure-leads-to-dismissal-of-aanzfta-usd-198-bn-claim/>> accessed 29 September 2026.

Tribunals also test how a State decides. In *Bilcon* the majority found that the environmental review of a quarry project was flawed and breached the minimum standard. The dissent warned that ordinary environmental review had become a treaty matter.⁶¹ In *Eco Oro* the tribunal held that Colombia breached the minimum standard in its handling of a protected páramo and that a general environmental exception did not remove the duty to pay compensation.⁶² Yet in July 2024 a majority awarded no damages and the investor has sought annulment.⁶³ In *Bear Creek* a tribunal found an expropriation after Peru revoked a mining right but cut compensation because the investor had contributed to the conflict.⁶⁴

The case law suggests a simple test for a climate measure. It should rest on a clear public purpose and follow a fair process. It should apply to all operators alike and should not contradict an earlier specific promise.

5. POLICE POWERS AND THE DEFENCE OF THE STATE

5.1. The Doctrine

The police powers doctrine says that a State owes no compensation for good faith and non-discriminatory regulation made for the general welfare. The *Saluka* tribunal described the rule as established in international law.⁶⁵ Human rights courts also give States a wide margin in regulating property in the public interest.⁶⁶ In *Philip Morris v Uruguay* the tribunal held that tobacco packaging rules were a valid exercise of police powers.⁶⁷

The doctrine has limits. The measure must be adopted in good faith and must not discriminate against the foreign investor. It must follow due process and many tribunals also ask whether it

⁶¹ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc v Government of Canada* (Award on Jurisdiction and Liability) PCA Case No 2009-04 (17 March 2015); Dissenting Opinion of Professor Donald McRae (10 March 2015); (Award on Damages) (10 January 2019).

⁶² *Eco Oro Minerals Corp v Republic of Colombia* (Decision on Jurisdiction, Liability and Directions on Quantum) ICSID Case No ARB/16/41 (9 September 2021); ‘Majority in *Eco Oro v Colombia* Finds Violation of Minimum Standard of Treatment, Holds That a General Environmental Exception Does Not Preclude Obligation to Pay Compensation’ (Investment Treaty News, 20 December 2021) <<https://www.iisd.org/itn/2021/12/20/majority-in-eco-oro-v-colombia-finds-violation-of-minimum-standard-of-treatment-holds-that-a-general-environmental-exception-does-not-preclude-obligation-to-pay-compensation/>> accessed 29 September 2026.

⁶³ *Eco Oro Minerals Corp v Republic of Colombia* (Award on Damages) ICSID Case No ARB/16/41 (15 July 2024); *Eco Oro Minerals Corp, ‘Eco Oro Seeks Annulment of ICSID Tribunal Decision on Damages and Announces US\$4.5 Million Financing’* (GlobeNewswire, 31 July 2025) <<https://finance.yahoo.com/news/eco-oro-seeks-annulment-icsid-120000144.html>> accessed 29 September 2026.

⁶⁴ *Bear Creek Mining Corporation v Republic of Peru* (Award) ICSID Case No ARB/14/21 (30 November 2017).

⁶⁵ *Saluka* (n 28) para 255.

⁶⁶ *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35; *James v United Kingdom* (1986) 8 EHRR 123.

⁶⁷ *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (Award) ICSID Case No ARB/10/7 (8 July 2016).

is proportionate.⁶⁸ The defence fails where the State made a specific promise as in *Rockhopper*. It also fails where the State discriminated as alleged in *Westmoreland* or acted arbitrarily as alleged in *Ruby River*.

5.2. Climate Measures as Police Powers

A climate ban has a strong public purpose. The Court said that fossil fuel production and licensing may be wrongful in themselves. National and regional courts agree. The Supreme Court of the Netherlands held that the State must cut emissions to protect human rights.⁶⁹ The German Federal Constitutional Court held that climate law must protect future freedoms.⁷⁰ The European Court of Human Rights held that Switzerland had failed to meet its climate duties.⁷¹ A tribunal should read the treaty in harmony with this law and give the State room.

Necessity is a weaker defence. The ILC Articles allow it only in narrow cases and preserve the question of compensation.⁷² Tribunals in the Argentine cases applied it with caution.⁷³

5.3. Treaty Text

Treaty wording can strengthen the defence. NAFTA Article 1114 lets a party adopt measures that it considers appropriate to make investment activity sensitive to environmental concerns if they are otherwise consistent with the chapter.⁷⁴ The CETA reaffirms the right to regulate and says that a change in law which harms an investor is not itself a breach.⁷⁵ The original ECT is weaker. Articles 19 and 24 contain environmental language and narrow exceptions but neither clearly covers expropriation or fair and equitable treatment.⁷⁶ The *Eco Oro* tribunal held that a general exception in another treaty did not remove the duty to pay compensation.⁷⁷ The modernised ECT adopted in December 2024 reaffirms the Paris commitments and the right to regulate.⁷⁸

⁶⁸ *Tecmed* (n 24) para 122; *Methanex* (n 27) pt IV ch D para 7.

⁶⁹ *State of the Netherlands v Stichting Urgenda* ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands, 20 December 2019).

⁷⁰ *Neubauer v Germany* 1 BvR 2656/18 (Federal Constitutional Court of Germany, 24 March 2021).

⁷¹ *Verein KlimaSeniorinnen Schweiz v Switzerland* App no 53600/20 (ECtHR, 9 April 2024).

⁷² International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' in 'Report of the International Law Commission on the Work of Its Fifty-Third Session' [2001] vol II pt 2 Yearbook of the International Law Commission 26, arts 25 and 27.

⁷³ *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic* (Decision on Liability) ICSID Case No ARB/02/1 (3 October 2006).

⁷⁴ NAFTA (n 20) art 1114(1).

⁷⁵ CETA (n 50) art 8.9.

⁷⁶ ECT (n 5) arts 19 and 24.

⁷⁷ *Eco Oro* (n 62).

⁷⁸ 'Adoption of the Modernised Energy Charter Treaty: Retaining the Key Role of Cross-Border Investment in the Energy Transition' (Freshfields) <<https://www.freshfields.com/en/our-thinking/blogs/sustainability/adoption->

6. QUANTUM AND THE VALUE OF RESERVES

Even after liability the amount is uncertain. An unlawful act calls for full reparation, which aims to wipe out its consequences.⁷⁹ A lawful expropriation usually carries fair market value.⁸⁰ Tribunals have used discounted cash flow, comparable transactions and sunk costs with widely varying results.⁸¹ Rockhopper claimed about EUR 225 million and received about EUR 190 million. Eco Oro claimed USD 696 million and received nothing.⁸²

Two points follow from climate law. First, the value of a reserve depends on regulatory risk. A tribunal that ignores carbon constraints overstates the loss. Second, damages may fall when the investor contributed to its own loss.⁸³ Scholars also argue that treaty compensation rules suit public interest regulation poorly.⁸⁴

Large awards may also deter States from acting. This is called regulatory chill.⁸⁵ The evidence is contested and some studies find little proof that treaties change State behaviour.⁸⁶

7. TREATY REFORM AND STATE PRACTICE

States have started to respond. The European Union and Euratom withdrew from the ECT with effect from 28 June 2025.⁸⁷ The United Kingdom also withdrew.⁸⁸ The sunset clause keeps

of-the-modernised-energy-charter-treaty-retaining-the-key-role-of-cross-102jrem> accessed 29 September 2026; '2024 in Review: Renewed Momentum and Key Developments for the Energy Charter Treaty' (Kluwer Arbitration Blog, 9 February 2025) <<https://legalblogs.wolterskluwer.com/arbitration-blog/2024-in-review-renewed-momentum-and-key-developments-for-the-energy-charter-treaty/>> accessed 29 September 2026.

⁷⁹ *Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 47; ILC Articles (n 72) arts 31 and 36.

⁸⁰ ECT (n 5) art 13(1).

⁸¹ *Tethyan Copper Company Pty Ltd v Islamic Republic of Pakistan* (Award) ICSID Case No ARB/12/1 (12 July 2019); *Crystallex International Corporation v Bolivarian Republic of Venezuela* (Award) ICSID Case No ARB(AF)/11/2 (4 April 2016); *Gold Reserve Inc v Bolivarian Republic of Venezuela* (Award) ICSID Case No ARB(AF)/09/1 (22 September 2014).

⁸² *Rockhopper* (n 32); *Eco Oro* (n 63).

⁸³ ILC Articles (n 72) art 39; *Bear Creek* (n 64).

⁸⁴ Jonathan Bonnitcha and Sarah Brewin, 'Compensation under Investment Treaties: What Are the Problems and What Can Be Done?' (IISD 2020).

⁸⁵ Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 606.

⁸⁶ Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (OUP 2017).

⁸⁷ Council of the EU, 'Energy Charter Treaty: EU Notifies Its Withdrawal' (Press release, 27 June 2024) <<https://www.consilium.europa.eu/en/press/press-releases/2024/06/27/energy-charter-treaty-eu-notifies-its-withdrawal/>> accessed 29 September 2026; European Commission, 'Energy Charter' <https://energy.ec.europa.eu/topics/international-cooperation/international-organisations-and-initiatives/energy-charter_en> accessed 29 September 2026.

⁸⁸ 'UK Energy Charter Treaty Exit: Navigating Investment Protections in the Energy Sector' (Ashurst) <<https://www.ashurst.com/en/insights/uk-energy-charter-treaty-exit-navigating-investment-protections-in-the-energy-sector/>> accessed 29 September 2026.

existing investments protected for twenty years and so until 2045.⁸⁹ The modernised text lets a party exclude investment protection for fossil fuels with a final cut-off date of 31 December 2040.⁹⁰ Critics call the reform too modest.⁹¹

Four steps follow. First, withdrawing States can conclude inter se agreements to disapply the sunset clause among themselves.⁹² Second, new treaties should state the right to regulate and exclude fossil fuel investments from the standards that support stranded asset claims. The CETA offers a model.⁹³ Third, States should pay transition sums to all operators alike. The *Westmoreland* complaint shows that unequal payments can give rise to a claim.⁹⁴ Fourth, States should record the climate reasons for each measure and avoid promises of licences that they may not keep.

8. CONCLUSION

The answer to the central question has two parts. In a narrow sense it is yes. An investor whose licence is revoked or whose concession is refused after specific dealings with the State can win compensation. *Rockhopper* shows this although annulment has left the case open. In a broad sense it is no. A general climate measure adopted in good faith and applied to all operators does not oblige the State to pay for every lost barrel.

Three findings support this view. The protected asset is the right and not the reserve. Legitimate expectations are hard to prove for an investor who entered the sector after the climate treaties. Police powers protect a State that acts in good faith without discrimination. Many claims also fail on jurisdiction or standing as in *Westmoreland* and *Zeph*. Others end in withdrawal as in *Uniper* and *RWE*.

The picture is still unsettled. *Ruby River* and *Zeph* are pending and *Rockhopper* will be heard again. No investment tribunal has yet applied the 2025 advisory opinion. If tribunals accept that fossil fuel licensing can be wrongful, the case on legitimate expectations will weaken further. Clear process, equal treatment and careful treaty drafting remain the best protection.

⁸⁹ ECT (n 5) art 47(3).

⁹⁰ Ashurst (n 88).

⁹¹ 'Why Coordinated Withdrawal From the Energy Charter Treaty Remains Essential for Effective Climate Action' (IISD) <<https://www.iisd.org/articles/insight/coordinated-energy-charter-treaty-withdrawal-essential>> accessed 29 September 2026.

⁹² IISD (n 91).

⁹³ CETA (n 50) art 8.9.

⁹⁴ *Westmoreland* (n 38).