The Limits of Global Property Rights: Quasi-Experimental Evidence from the Energy Charter Treaty

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Abstract: The Energy Charter Treaty (ECT) is the primary international mechanism protecting the property rights of foreign energy investors. By giving firms the ability to sue host governments in neutral venues, the hope was that expropriation risks would reduce and thereby spur investment. Has the ECT lived up to these aims? We analyze how exogenous changes to the property rights provided to Russian firms under the Energy Charter Treaty impact political risk. We find no evidence that the increases or decreases to rights under the investment regime altered firm value. The results indicate that the ECT has limited effects on an investment climate, at least in the eyes of financial markets. The findings suggest that critics of the ECT are right to call for reforming the institution as it may be hampering a green energy transition without adequately providing the promised economic returns. More theoretically, the paper contributes to debates on the relationship between state power and international environmental institutions, and highlights the importance of offshore finance for altering business-government relations in the energy sector.

Keywords: energy charter treaty; international institutions; investment regime; investment treaties; treaty effectiveness; energy transition

How do energy investors protect the value of their investments? With their high start-up costs, and the fixed nature of their assets, energy projects are constantly susceptible to expropriation (Hajzler, 2012; Mahdavi, 2014). Moreover, the bulk of fossil fuels and the minerals necessary to build renewable energy infrastructure are located in countries with weak institutions. To protect their property, scholars generally expect companies to try to align themselves with their host governments or to team up with domestic firms with close ties to the state (Faccio et al., 2006; Johns and Wellhausen, 2016; Wellhausen, 2014). Policymakers, by contrast, push for greater transparency and improving the rule of law in host countries. The Energy Charter Treaty is undoubtedly the most ambitious international attempt to achieve these goals (Axelrod, 1996; Hobér, 2010). Now almost three decades old, with over 50 different signatories, the ECT aims to create an integrated international energy market. The hope was that allowing foreign investors to sue their hosts in international arbitration venues would give the ECT the necessary force to deter states from interfering in market operations, thereby increasing investments in the sector as a whole.

Despite the laudable intent, the ECT has recently come under attack from a variety of political factions. The treaty was intended to safeguard investments across Eastern Europe following the fall of the Soviet Union, but in the last few years the majority of cases have been filed against countries across the West. Infamously, Swedish conglomerate Vattenfall took Germany to court when the jurisdiction decided to phase out nuclear energy (Sanderson, 2021). Spain, on the other hand, was found to have provided an insufficiently stable regulatory environment, leading the government to pay millions of euros to investors in the solar sector (Coughlin, 2019). Members of the European Parliament have cited the ECT, and its broad

investment protections regardless of the nature of the energy (fossil fuel vs. renewable) under dispute, as one of the biggest threats to the continent's ability to transition toward a green future (Seghezzi, 2021).

In this *Research Note*, we seek to assess whether or not the ECT spurred investment in the energy sector. In other words, we test if the ECT lived up to its designers' goals. Most studies on the effectiveness of investment treaties use observational, country-level data to analyze changes in FDI inflows, but we take a different approach building on three recent trends in political economy scholarship. First, we move to the firm-level, looking at how the ECT benefits domestic companies that are set to gain from these instruments. Second, we utilize the event-study method from financial econometrics that is becoming an increasingly common approach to assess the impact of international rules (Kucik and Pelc, 2016; Wilf, 2016).[1] Empirically, we analyze an infamous instance of "treaty shopping" – where firms use their foreign subsidiaries or holding companies to gain access to international investment protections – to estimate the value of global property rights (Betz and Pond, 2019).

More specifically, we take advantage of Russia's controversial relationship with the ECT. Although Russia was a signatory, the state never ratified it. This left the global protection of energy investments in Russia legally ambiguous until Putin's political rivals used its provisions to fight back against the Kremlin's seizure of their oil company, Yukos. The various legal battles provide us with two exogenous increases to property rights protection and eventually an

[1] In Appendix 1 we provide details on the implementation of the method.

exogenous removal of these protections. We analyze how these treatments influenced the value of energy firms traded on the Moscow Stock Exchange.

Although investment treaties like the ECT are targeted at foreign firms, there are substantial gains for domestic entities. Multinational Corporations (MNCs) will be more likely to invest or engage in joint ventures in the home jurisdiction, while foreigners will become more confident in lending to domestic entities. These gains become particularly effective when you consider the treaty shopping effects – domestic firms can use *their own* offshore holding companies or subsidiaries to gain access to the investment protections of an international treaty as our natural experiment below details. This is particularly common with the ECT, where Dutch holding companies are frequently used as the basis to sue host states. In sum, domestic firms have the option to use international venues to sue their own sovereigns, incentivizing the state to avoid predation and, if the legal deterrence fails, institutionalized recourse.[2]

Despite the changes to global property rights, we find that the ECT's application and invalidation had no consistent effects on energy firm values in Russia. The results indicate that the ECT has more limited effects than some prior academic research, and the policy proponents of investment treaties, suggest. Instead, the benefits appear to be discrete, giving only select firms *ex post* recourse, while rearranging the sites of domestic political battles.

[2] The use of offshore structures to exploit the investment regime is a regular feature of the system, with extraterritorial arbitrations coming from numerous countries including multi-billion-dollar disputes from Russia (detailed in this paper), Ukraine, Kazakhstan, and Turkey.

I. The Energy Charter Treaty, Russia, and the Yukos Affair

Control over energy assets has consistently been the bedrock of Russian politics. Throughout the Cold War, the Soviet Union exploited its natural resources to achieve its geopolitical ends, a pattern that has returned to prominence over the past decade. Russia continues to use the flow of oil and gas to mediate its relations with both allied and adversarial neighbors (Finon and Locatelli, 2008; Harsem and Claes, 2013; Prontera and Plenta, 2020). In the '90s, the sector included the most sought-after assets during the privatization of Soviet enterprises (Freeland, 2005; Locatelli, 1999), a process that was responsible for building up more than a dozen billionaires. The so-called "oligarchs" became the face of the country during the Yeltsin era as their crude based cash flows put them in the position to capture the state (Hellman, 1998). Their political and economic power eventually turned into the cause of conflict between the Russian elite and the state, helmed by Vladimir Putin, in the 2000s as the latter began to claw back its strategic assets (Reynolds and Kolodziej, 2007; Sakwa, 2014). The political conflict gives us the rare opportunity to causally assess the value of the Energy Charter Treaty.

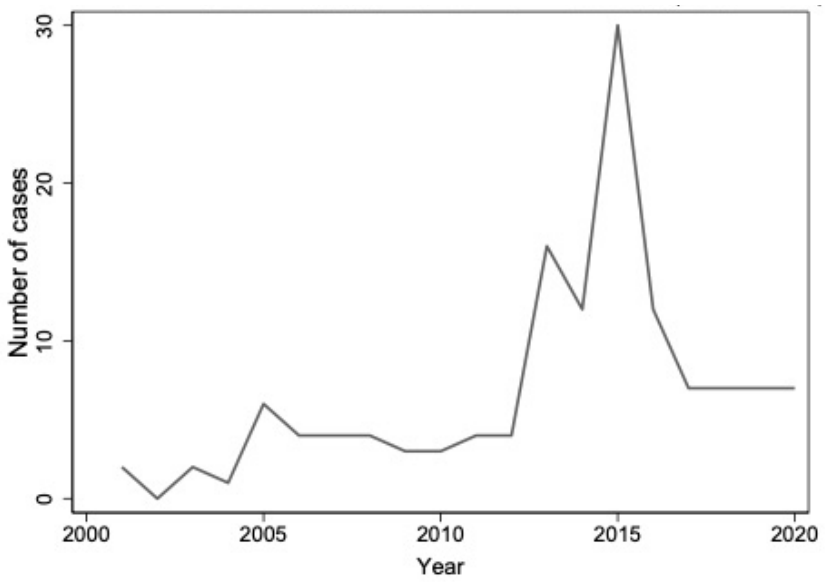


Figure 1: Number of Arbitration cases under the ECT (Total cases: 135)

Most studies on the effectiveness of international investment treaties are plagued by concerns of omitted variable bias and endogeneity because they examine the consequences of deliberate political decisions that take years of bargaining. Put simply, treaty adoption cannot be deemed exogenous. We overcome these issues by examining the effects of unpredictable (as-if random) legal decisions on the coverage of the Energy Charter Treaty, which only directly impacts one sector of the economy. The ECT is a multilateral trade and investment treaty that aims to create an integrated, non-discriminatory energy market. Newly independent, former Soviet states needed to attract investments to exploit their natural resources but MNCs needed safeguards to put their money into these weakly institutionalized jurisdictions. The ECT was seen as the solution to reduce political risk.[3] Its most widely known section, Article 26, ensures

[3] For a historical and legal analysis of the ECT see Hobér (2010).

that foreign investors can use international arbitration venues to resolve disputes with their host states.

The ECT is a central piece of the international investment regime – over 135 Investor-State Dispute Settlement (ISDS) cases have invoked the ECT making it one of the most frequently used treaties to initiate such claims. As Figure 1 documents, the ECT has become increasingly popular with an outburst of cases over the past decade. Disputes have covered the full range of energy assets, including fossil fuels, nuclear, and renewables, involving 25 different countries as defendants (Figure 2).

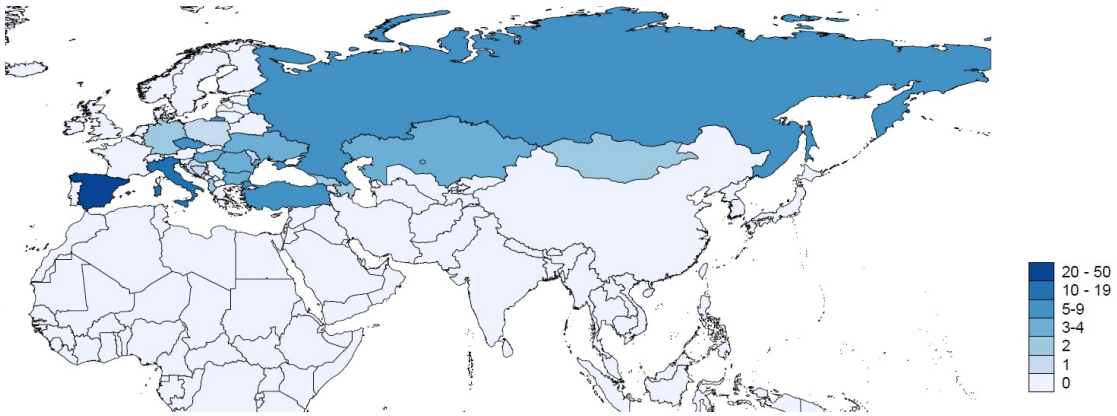


Figure 2: Geographic distribution of ECT related arbitrations. Color represents the number of cases filed against a given country.

The Russian Federation was one of the original signatories but, importantly for our purposes, the treaty was never ratified by the Russian Duma. The lack of domestic ratification meant that the ECT was not clearly considered in force in Russia. Its validity and thereby its protection of foreign energy investments in Russia remained ambiguous till the aftermath of the Yukos Affair that began in 2003. At the time, Mikhail Khodorkovsky was the richest man in Russia based on his holdings in the oil giant Yukos. He was seen as the primary political

challenger to Vladimir Putin, but that swiftly changed as the Kremlin engineered a takeover of the private enterprise. The government argued that Yukos had been evading taxes to the tune of $28 billion – Khodorkovsky was imprisoned, the company was put into bankruptcy and wound up in the hands of Russian state-owned enterprise Rosneft.[4]

Treatment One[5] - *the expansion of the ECT*: The fight was, however, never going to end that quickly. Khodorkovsky's business partners put on a multijurisdictional assault to regain their economic losses. Years before the expropriation, they had inverted the ownership structure of their company, transferring their shares to a variety of offshore holding companies. While Yukos was the face of Russian capitalism, the company, like many of its *de facto* Russian competitors, was *de jure* a foreign corporate. Such use of offshore holding companies to route domestic investments, so-called "round tripping," is rampant across Russian industries (Aykut et al., 2017). The ownership structure potentially gave them access to the international investment protections that Russia was party to, and in 2005 they filed a claim against the Russian Federation using their offshore companies under the authority of the ECT. This was the first time that the ECT was used in such an extraterritorial fashion (*de facto* domestic actor vs. home government), but the approach has since been replicated in more than a dozen disputes.

The Permanent Court of Arbitration (PCA) in The Hague took years to decide if the Yukos shareholders had legal standing, and on June 30th, 2009 the PCA issued an interim award on jurisdiction that affirmed the rights of the investors to sue Russia on the basis of the ECT,

[4] For a detailed examination of the Yukos affair see Sakwa (2014) and Sixsmith (2010).

[5] The following three sub-sections outlining the case draw from DLA Piper (2016).

recognizing their foreign investor status – the outcome was labeled a "landmark decision" with major implications for the investment climate in Russia (Elliott, 2009).

This was the first publicized use of the ECT against Russia after years of legal ambiguity around its validity. As per existing theories on the importance of investment treaties (Milner, 2014), we should expect an increase in the value of Russian energy firms. They would now have more possibilities for domestic joint ventures with MNCs, and, most importantly, they could even take advantage of international institutions to protect themselves in the future. These safeguards should diminish future predation from the state, thereby reducing political risk. Soon after the PCA's initial decision Russia announced that it would be withdrawing from the ECT, but as per the "sunset clause" of the treaty, its provisions would be enforced for 20 years after any country's withdrawal. This ensured that any pre-existing energy investments in Russia, such as the domestic energy firms[6] and their foreign investors, would continue to benefit from increased property protections.[7]

E1: The value of Russian energy firms should increase following the PCA's interim award on jurisdiction because it affirmed the global property rights provided by the ECT.

[6] The decision affirmed that the ECT's definition of a foreign investor is expansive. Given the prevalence of "round tripping" in Russia, we assume that the energy companies and their investors would have some offshore ties that would allow them to claim foreign investor status.

[7] We exclude Russia's withdrawal from the ECT from the core of the paper since it is not exogenous. But we conduct the analysis and find null effects (Appendix 2 Table A1).

Treatment Two – the affirmation of investor rights: The tribunal took multiple years to decide whether Russia had violated the ECT. The tribunal still needed to rule on whether the claimants had standing given that they had been accused and convicted of criminal activity. Moreover, it was yet to decide if the ECT would cover the specific taxation measures in dispute. The latter was crucial because taxation continued to be the core of the economic elite's struggle with the Kremlin. But the outcome was one that even Yukos could have "scarcely imagined" at the dispute's onset (Buckley and Hill, 2014). On July 18th, 2014,[8] the claimants were awarded $50 billion – the biggest ever ISDS award. The new legal decision, and the force of the outcome, acts as another positive exogenous property rights shock for energy companies operating in Russia.

E2: The value of Russian energy firms should increase following the PCA's ruling in favor of Yukos because the decision affirmed the applicability of the ECT and confirmed the measures used by the Russian government violated the ECT's terms.

Treatment Three – the retreat of property rights: But the legal drama was far from over. Russia was adamant that it should not be bound by the ECT, and on April 20th, 2016 the District Court of The Hague (DCH) agreed. The court ruled that the 2014 award was invalid because of conflicts between the ECT and domestic Russian law – the first time in 20 years that the DCH overruled an arbitration decision (Interfax: Kazakhstan Oil & Gas Weekly, 2016). This in effect removed the protections of the ECT for any foreign or domestic firms operating in the country, which we view as an exogenous removal of property rights that would thereby increase political

[8] We also conducted an additional test for the date of July 28th, 2014 when the judgment was made public and the results are the same (see Appendix 6 Table A5).

risk for Russian energy firms/investors according to existing theories on the impact of investment treaties.

E3: The value of Russian energy firms should decrease following the DCH's decision because it removed the global property rights of investments in Russia via the ECT.

Beyond the quasi-experimental nature, the case of Russia and the Yukos affair is a particularly appropriate setting to assess the effectiveness of the ECT. As per recent research on investment treaties, we should see the biggest gains from investment treaties in industries with fixed costs (Kerner and Lawrence, 2014), and in sectors with a large state presence (Bauerle Danzman, 2016) such as Russia's energy sector.[9] More generally, autocracies have the most to gain from investment treaties (Arias et al., 2018). In sum, numerous features of the research design suggest that we should be most likely to find evidence of the ECT improving the investment climate in the Russian context.

II. Data and Methods

If the ECT effectively reduces political risk by giving foreign and domestic energy investors global institutional protections, the value of domestic energy firms should change as it comes into force and when it gets removed. In other words, due to changes in political risk, we should see domestic energy firms experience abnormal returns compared to the broader Russian market. To assess the hypothesis, we collected data on price changes for all the

[9] We run a separate analysis on *energy and utilities* companies to account for the possibility of spillover effect of the announcement to this interconnected sector (See Appendix 3 Table A2).

companies traded on the Moscow Stock Exchange that are available through Bloomberg.[10] Following the standard event study method devised by financial econometricians, we calculate the abnormal rate of returns for all traded energy companies in relation to the fifty largest companies[11] (weighted by market cap) that are not energy firms. The table below shows the results for each of the three treatments using different windows to estimate the abnormal returns. We find inconsistent results for each of the three treatments.

Table 1: Event Study Analysis Results of Cumulative Abnormal Returns for energy companies compared to the top 50 Russian companies weighted by market cap[12]
Note: Bootstrapped standard errors in parentheses; * p < 0.10%; ** p < 0.05%; *** p < 0.01%.

Date of event	Event window	Energy companies	Adjusted Patell test p-values
11/30/2009 PCA confirms that Yukos/GML have rights under the ECT	5 days after	-2.239 (.125)	(.125)
	1 day before and after	-1.774* (.0753)	(.075)*
	3-6 days after	-1.728* (.077)	(.077)*
7/18/2014	5 days after	1.996	(.888)

[10] Based on Bloomberg's industry classifications, we have data for 13 energy companies in 2009 and 19 in 2014 and 2016. See Appendix 4 for a full list of companies. We also compiled the data through the Russian website Finam.ru for comparison and, despite a smaller sample size, we find consistent results.

[11] Event studies usually compare the returns for the treated group to the index that tracks the market that the companies are traded on. In our case that would be the MOEX, but it includes some energy firms. The MOEX is calculated by using the 50 biggest stocks by market cap (regardless of industry) so we create a parallel substitute to exclude energy companies. We also weighted by highest traded volume and the results were similar to those reported.

[12] See Appendix 5 Table A4 for results at additional cutoffs of the event window.

PCA rules in favor of Yukos/GML		(.8881)	
	1 day before and after	-1.355 (.130)	(.130)
	3-6 days after	.769 (.531)	(.531)
4/20/2016 Dutch High Court rules the 2014 decision invalid on jurisdictional grounds	5 days after	-.531 (.864)	(.864)
	1 day before and after	.103 (.955)	(.955)
	3-6 days after	-.424 (.874)	(.874)

After the Permanent Court of Arbitration agrees to hear Yukos's claim on July 30th, 2009, and the legal ambiguity of the ECT is resolved, there are no statistically different returns for energy companies. We should expect, as per prior work, that there should be significant positive abnormal returns, but our coefficients have negative directions. Similarly, after the PCA rules in favor of Yukos on July 18th, 2014, affirming the validity of using offshore structures and the court's willingness to take on politically contentious disputes, we see no consistent effects. Finally, after the District Court of The Hague strikes down the award because of the ECT's conflict with domestic Russian law, on April 20th, 2016, we see no statistically significant effects. Figures 3, 4 and 5 show these divergent relationships graphically.

Figure 3: Change in Russian Energy Firm Prices after Announcement on 30 November 2009 (average prices across industry)

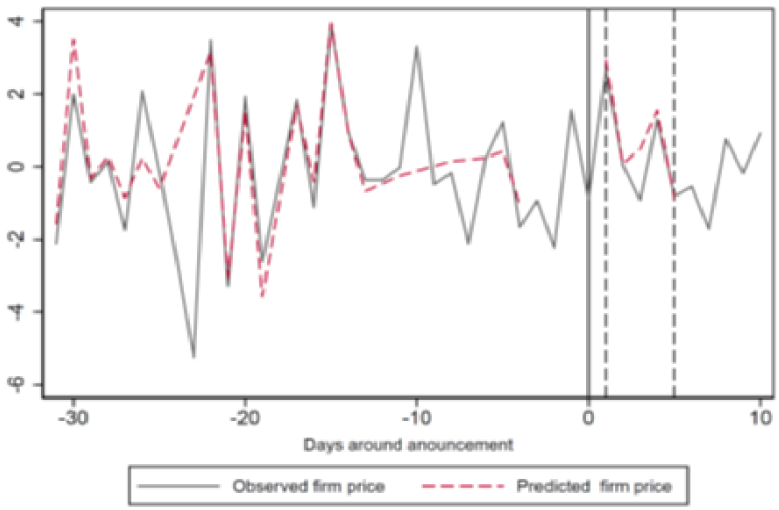


Figure 4: Change in Russian Energy Firm Prices After Announcement on 18 July 2014 (average prices across industry)
Note: Due to the announcement taking place during the weekend the event window in this case was measured for the 5 days following the announcement starting on the second day.

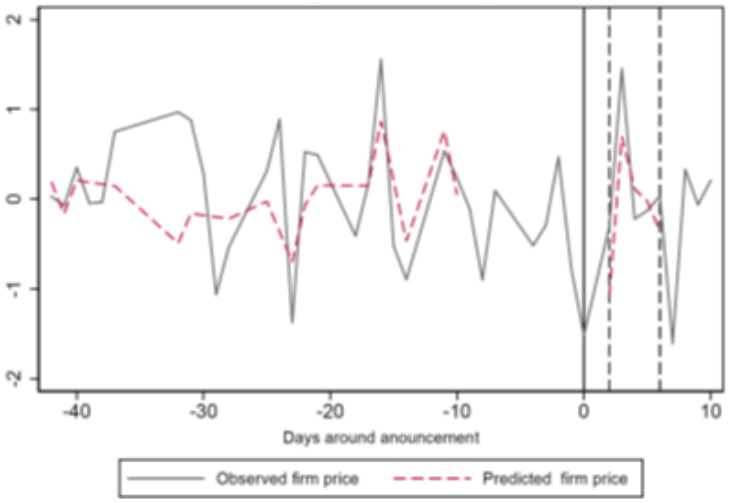
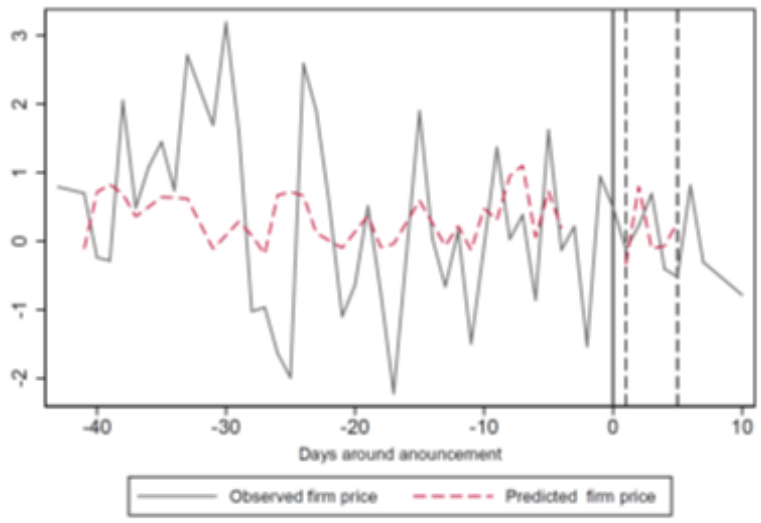


Figure 5: Change in Russian Energy Firm Prices After Announcement on 20 April 2016 (average prices across industry)



Prior research would expect the ruling to worsen the investment climate, leading to negative returns for energy firms. In addition to the cumulative abnormal results reported in Table 1 we also run a battery of significance tests.[13] We implemented the Patell, Adjusted Patell, Standardized Cross-Sectional and Adjusted Standardized Cross-Sectional tests as robustness checks (Pacicco et al., 2018), as well as the jackknife procedure, and we continue to find inconsistent results. We report the results for the Adjusted Patell Test, which accounts for autocorrelation and event induced volatility, in Table 1 as well as the Appendix tables.[14]

III. Conclusions and policy implications

The Energy Charter Treaty is supposed to increase investments, and thereby firm value, by providing investors global property rights and diminishing political risk. We find that the treaty fails to live up to this promise. By examining exogenous legal decisions, we can gain a clearer causal estimate of the effects of the ECT and the investment regime more generally. The

[13] See Appendix 1 for details on each additional diagnostic test.

[14] The other robustness checks are available upon request.

finding falls in line with recent research in international political economy and international law, which illustrate the limited gains from bilateral investment treaties (Brada et al., 2020; Poulsen, 2017). We improve on this work by analyzing the firm-level, providing micro-foundations on international economic law that generally relies on observational country-level financial flows.

One important limitation of the study is that Russia is still bound by other investment treaties, so the ECT could simply be seen as redundant (Peinhardt and Wellhausen, 2016). We expect this is unlikely in our case because the ECT has some of the deepest legal provisions of any investment treaty. Understanding how energy companies assess, and exploit, the benefits of having treaties with multiple jurisdictional bases and different protection provisions is a critical next step for the broader research agenda on international environmental institutions. Importantly, our results do not imply that the ECT does not matter. Instead, they underscore its political consequences. Rather than only providing credible commitments, international investment institutions have become tools of political conflict. In important instances they act as extraterritorial intermediaries between autocrats and their oligarchic rivals.

The paper is particularly timely as members of the European Union reassess their relationship with the ECT. In 2016, Italy became the first West European country to pull out of the treaty because it viewed the international institution as creating an uneven playing field between MNCs and the state. Netherlands' lenient rules on corporate domicile has made it a key enabling player in the rise of ECT disputes and has been criticized for its role in stacking the deck in favor of corporates. The country is ironically now in the ECT's crosshairs as the country faces a 1.4 billion euro claim from RWE related to the country's decision to phase out coal

(Khan, 2021). Some members of the European Parliament argue that the treaty could end up costing the EU over a trillion euros in damages paid to fossil fuel companies as the jurisdiction attempts a switch toward a more sustainable, renewables driven future (Seghezzi, 2021). That figure massively dwarfs the money currently committed by the EU to greening its energy infrastructure. Our findings indicate that alterations to the property protections embedded in the ECT are unlikely to change the inflow of money, or the expectations of inflows, into future energy related investments – this cuts against one of the core rationales for avoiding a renegotiation of the treaty. But the insurance policy it provides could continue to cost states who attempt to alter their energy mix without living up to the promises of increased economic growth.

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