

Ability to consider phasing out fossil fuels

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*This advice is provided in response to **Query 8/23***

Query:

Are there any legal obstacles that would prevent the Parties to the UNFCCC and the Paris Agreement to consider, under these agreements, the necessity to phase out the extraction and use of fossil fuels?

Executive Summary:

We have not identified in any of the provisions of the UNFCCC or the Paris Agreement support for the proposition that the Parties are precluded from considering the phasing out of the extraction and use of fossil fuels. There is no explicit language to that effect, nor are the objectives stated in the agreements inconsistent with that action. State practice also demonstrates that numerous nations have already construed the text in these agreements as support and justification for phasing out fossil fuel usage and production. Additionally, according to scientific consensus around the significant contribution that fossil fuels have on greenhouse gas emissions, the phasing out of fossil fuels is a reasonable, and perhaps even necessary, means of satisfying the objectives of both the UNFCCC and Paris Agreement.

Advice:

1. The Necessity to Phase Out Fossil Fuels is a Reasonable Interpretation of the Requirements under the UNFCCC and Paris Agreement

Under Article 31 of the Vienna Convention on the Law of Treaties (VCLT), the first place to look to determine the reasonableness of a particular interpretation of a treaty is the text itself.¹ Article 2 of the UNFCCC states that:

The **ultimate objective** of this Convention and any related legal instruments that the Conference of the Parties may adopt is to **achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.** Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to

¹ VCLT, Art. 31 provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

Although this provision does not explicitly mention phasing out fossil fuels, based on the ordinary, plain meaning of the terms of Article 2 of the UNFCCC, it is reasonable to interpret the obligation to achieve stabilization of greenhouse gas emissions as a justification for Parties to consider phasing out fossil fuels. Nothing in the treaty text explicitly prohibits policies aimed at phasing out fossil fuel production as a means for Parties to achieve the stabilization of greenhouse gas emissions. Absent such prohibition, there appears to be no legal obstacle based on a strictly textual interpretation of this provision.

The link between fossil fuel production, use, and exportation and the limiting of greenhouse gas emissions is mentioned in the context of the possible impacts of climate change “response measures” (measures to reduce GHG emissions) on Parties whose economies are highly dependent on income generated from such production, processing and export, and/or consumption of fossil fuels (see UNFCCC preamble and Article 4 para.8 h). As a result, Article 4 para 10 stipulates that, in implementing their commitments, Parties shall take into consideration the specific situation of such parties.

The UNFCCC and the Paris Agreement primarily focus on the causative agent of climate change, the anthropogenic generation of GHG emissions downstream (at the end of a process) and not their original sources (upstream). The UNFCCC specifically refers to the variety of man-made GHG emissions including energy, transport, industry, agriculture, forestry and waste management (Article 4 para.1 c). This is, for example, reflected in the territorial accounting system, which captures GHG emissions by national sources and removals by sinks, not their upstream origin or whom they ultimately benefit.

This approach is different to the one, for example, of the Montreal Protocol on Substances that Deplete the Ozone Layer which phases down the production and consumption of man-made chemicals. The UNFCCC’s approach reflects the fact that GHG emissions occur naturally (and were considered an unavoidable necessity in many sectors in the 1990s). It does, however, not require a continuous anthropogenic input through the production and consumption of further fossil fuels.

Article 31 of the VCLT also requires looking into the *object and purpose* of both the UNFCCC and the Paris Agreement to determine a proper interpretation of State party obligations. Article 2 of the UNFCCC establishes the “ultimate objective” of the FCCC as the stabilization of GHG concentrations at a safe level—that is, a level that would “prevent dangerous anthropogenic interference with the climate system”. The exact legal status of the convention’s stabilization objective is uncertain. Article 2 in its final form uses declarative language and does not characterize the objective as a commitment. Also unclear is whether the Article 2 objective specifies the ‘object and purpose’ of the FCCC, within the meaning of the VCLT, which precludes reservations that are incompatible with the ‘object and purpose’ of an agreement, and requires signatories to refrain from actions that would ‘defeat the object and purpose’ of the agreement. In what may have been an attempt to prevent ‘objective’ from being equated with ‘object and purpose’, Article 2 adds the qualification ‘ultimate’.²

The Paris Agreement’s general purpose is defined in its Article 2 and includes holding temperature increase to ‘well below’ 2C above pre-industrial level, while also pursuing efforts to stay below 1.5C. In order to achieve this goal, Parties aim to reach global peaking of GHG emissions as soon as possible.. and to achieve rapid reductions thereafter in accordance with the best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks (“net zero”) in the second half of this century (Article 4 para. 1). This implies the need for an alignment of fossil fuel production and climate finance (Article 2 para. 1 c). In turn, the Paris Agreement mandates that “all

² D. Bodansky, J. Brunnée, L. Rajamani, *INTERNATIONAL CLIMATE CHANGE LAW* (2017), p. 125 (internal citations omitted).

parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies.” (Art. 4, para. 19). It is therefore reasonable to interpret the phasing out of fossil fuels as a justified approach for a Party to take in order to fulfil its treaty obligations, particularly because science supports that phasing out fossil fuels is essential to meeting this goal.

While the UNFCCC does not provide specific guidance to states on how or when to limit fossil fuel production or consumption, the Paris Agreement (implementing the UNFCCC) does to some extent. Although the Paris Agreement does not explicitly use the term “fossil fuels”, there is a clear link between fossil fuels and its climate change goals that is supported by scientific consensus.

2. State Practice Reveals that Numerous States Have Already Interpreted the Text as Supportive of Fossil Fuel Phase Outs

Under Article 31(2)(b) of the VCLT, “any subsequent practice in the application of the treaty which establishes *the agreement of the parties regarding its interpretation*” is relevant to determining a treaty’s interpretation. Thus, the subsequent actions of Parties to the UNFCCC and Paris Agreement are relevant to determining how the text of both treaties can be reasonably construed. The fact that numerous Parties have created or joined various types of fossil fuel phase out initiatives is relevant to determining that fossil fuel phase out is a reasonable interpretation of requirements to reduce GHG emissions under the UNFCCC and Paris Agreement.

For instance, in 2017 the international Powering Past Coal Alliance (PPCA) was formed and spearheaded by the UK and Canada. This coalition features over thirty governments and businesses working to accelerate global coal phase out as a means to meet the obligations set out in the Paris Agreement.³ Similarly, the Beyond Oil and Gas Alliance (BOGA) was formed by Costa Rica and Denmark as an international alliance of governments and stakeholders working together to facilitate the managed phase-out of domestic oil and gas extraction and to end new concessions, licensing or leasing rounds. The rationale cited is that recent reports from UNEP, the International Energy Agency and the IPCC have made it clear that reaching the goals of the Paris Agreement requires significant reductions in coal, oil and natural (fossil) gas.⁴

Additionally, in 2021, the COP 26 Glasgow Climate Pact called on Parties to accelerate efforts towards the “phasedown” of unabated coal power and phase-out of inefficient fossil fuel subsidies. Collectively, Parties discussed the inclusion of a reference to phasing out fossil fuel production in the COP decision in Egypt in 2022.⁵ Whilst this failed, the Sharm el-Sheikh mitigation ambition and implementation work programme (Decision 4/CMA.4) seems like the natural fit for further substantive discussions.

While there is no express agreement of all parties to the UNFCCC and Paris Agreement that the phase out of fossil fuels is consistent with these treaties, the fact that a significant contingent of Parties have already undertaken to phase out fossil fuels supports that both treaties legally permit fossil fuel phase outs.

3. Science Supports that Phasing out Fossil Fuels Aligns with the Objectives of both the UNFCCC and Paris Agreement

The scientific consensus clearly links the need to phase out fossil fuels with the reduction of GHG emissions necessary to achieve the stated object and purpose of both the UNFCCC and Paris Agreement.

³ Powering Past Coal Alliance, *Our Members*, <https://poweringpastcoal.org/members/>

⁴ Beyond Oil & Gas Alliance, *Redefining Climate Leadership*, <https://beyondoilandgasalliance.org/>

⁵ See: <https://www.sei.org/perspectives/cop27-phasing-out-fossil-fuels/>

The “best available science” shows that “phasing-out the production and use of fossil fuels is essential to meeting the Paris Agreement’s 1.5-2°C temperature limits.”⁶ There is already ample scientific support that fossil fuel usage significantly contributes to greenhouse gas emissions. For example, according to the 2021 “Production Gap” report published by the Stockholm Environmental Institute, IISD, and UNEP, “Global fossil fuel production must start declining immediately and steeply to be consistent with limiting long-term warming to 1.5°C.”⁷ Yet, the same report explains that “although many governments have pledged to lower their emissions and even set net-zero targets, they have not yet made plans to wind down production of the fossil fuels that, once burned, generate most of those emissions.”⁸

Another major study indicated that, in order to meet the Paris Agreement’s targets, “By 2050, we find that nearly 60 per cent of oil and fossil methane gas, and 90 per cent of coal must remain unextracted to keep within a 1.5 °C carbon budget.”⁹ The International Energy Agency has also reported that in order to meet the Paris Agreement’s 1.5°C limit, nations would need to immediately stop approving new coal-fired power plants and new oil and gas fields, quickly phase out gasoline-powered vehicles, and slash carbon dioxide emissions to net zero by 2050.

Thus, based on this scientific consensus, it is reasonable to consider the necessity of phasing out fossil fuels as part of achieving the ultimate objective of the UNFCCC and the goals of the Paris Agreement. In the legal literature, this has led to several proposals on the need to leave fossil fuels in the ground, state obligations to eliminate fossil fuel production and subsidies as well as new principles of international law.¹⁰

4. Conclusion

There are no legal obstacles that would prevent the Parties to the UNFCCC and the Paris Agreement to consider the necessity to phase out the extraction and use of fossil fuels.

A complete legal analysis on whether, and to what extent, states are now required to consider this issue would have to take into account human rights obligations, commitments under other multilateral environmental agreements as well as domestic law and policy. These significantly exceed the scope of the present advice paper. But there are no provisions in the Paris Agreement that bar Parties from considering the phasing out of fossil fuels – either collectively or individually.

⁶ I. Gerasimchuk, L. Merrill, R. Bridle, P. Gass, L. Sanchez, L. Kitson, P. Wooders, *Fossil Fuel Phase-out and a Just Transition: Learning from stories of coal phase-outs*, in *Stories for Success for the UNFCC Talanoa Dialogue*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, available at International Institute for Sustainable Development, available at: https://unfccc.int/sites/default/files/resource/69_IISD%20Fossil%20fuel%20phase%20out%20and%20just%20transition%2C%20stories%20for%20success.pdf.

⁷ SEI, IISD, ODI, E3G, and UNEP. (2021). *The Production Gap Report 2021*, pp. 2, 4, 12, 33.

<http://productiongap.org/2021report>

⁸ *Id.*, at pg. 3

⁹ Welsby, D., Price, J., Pye, S. *et al.* Unextractable fossil fuels in a 1.5 °C world. *Nature* **597**, 230–234 (2021). p. 230, <https://doi.org/10.1038/s41586-021-03821-8>.

¹⁰ For a comprehensive overview see: Harro van Asselt, *Governing fossil fuel production in the age of climate disruption: Towards an international law of ‘leaving it in the ground’*, in *Earth System Governance*, 2021, available at: www.sciencedirect.com/journal/earth-system-governance