

BUSTING THE MYTHS AROUND THE ENERGY CHARTER TREATY

A GUIDE FOR CONCERNED CITIZENS, ACTIVISTS, JOURNALISTS AND POLICYMAKERS



Busting the myths around the Energy Charter Treaty

A guide for concerned citizens, activists, journalists and policymakers

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Authors: Fabian Flues, Pia Eberhardt & Cecilia Olivet

Editor: Paula Dobbyn

Design: Maria Chevalier

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INTRODUCTION

Five years after the Paris Agreement was signed, concern is mounting over another, lesser-known international treaty: the Energy Charter Treaty (ECT). The ECT is an antithesis to the Paris Agreement, allowing fossil fuel companies to sue countries over their climate policies rather than strengthening the global response to climate change.

The ECT was signed over two decades ago without much public debate. It protects all investments in the energy sector, including coal mines, oil fields and gas pipelines. Any state action that harms a company's profits from these investments can be challenged outside of existing courts, in international tribunals consisting of three private lawyers. Governments can be forced to pay huge sums in compensation if they lose an ECT case. Oil and gas company Rockhopper, for example, is suing Italy over a ban on new offshore oil drilling. Coal company Uniper/Fortum is threatening to sue the Netherlands for its coal phaseout. Several Eastern European countries have been sued because they took steps to lower electricity prices and cut into the profits of energy companies. The lawsuits demonstrate how the ECT can also be used against government action to reduce energy poverty.

As a result of the ECT's threats to ambitious climate action, the European Commission has called it "outdated" and "no longer sustainable". Parliamentarians from across Europe have called on EU member states to jointly withdraw from the ECT if it continues to protect dirty energy sources. In the wake of its first ECT-lawsuits, Italy has already left the agreement.

But powerful interests are gearing up to defend the treaty – and even expand it to new signatory states, particularly in Africa, Asia and Latin America. These interests include the fossil fuels lobby, which is keen to keep its powerful legal privileges; lawyers, who make millions arguing ECT cases; the ECT Secretariat, which has close ties to both industries and whose survival depends on continuation of the treaty – and the list goes on.

In light of the growing controversy, this guide aims to help activists, concerned citizens, journalists and policymakers confront pro-ECT propaganda. It identifies the ECT's defenders and their arguments, and offers deeply researched counter-evidence.

At a time when all eyes should be focused on averting a climate catastrophe and safeguarding opportunities to regulate in the public interest, an outdated agreement that undermines climate action as well as governments' rights to act in the interests of their citizens must be scrapped. The ECT has to go – and it requires political and collective action as well as intelligent arguments to make that happen.

AN INCREASINGLY CONTROVERSIAL AGREEMENT

The Energy Charter Treaty (ECT) is a 1994 international agreement for the energy sector that grants investors special rights and access to arbitration tribunals. Its membership includes 53 countries from Western and Eastern Europe, Central and Western Asia, and Japan, Jordan and Yemen,¹ as well as the European Union (EU) and the European Atomic Energy Community (EURATOM).

The ECT includes many rules – including on energy transit and trade – but the provisions regarding protections for foreign energy investments are its cornerstone. These provisions give sweeping powers to foreign investors in the energy sector, including the privilege to directly sue governments outside of existing courts, in international tribunals consisting of three private lawyers, the arbitrators. In these tribunals, companies can claim large sums in government compensation for actions they argue have damaged their investments. With corporations claiming not just for the money invested but for loss of future anticipated earnings as well and with added interest, states can be forced to pay huge amounts in damages if they lose a suit (see Box 1).

BOX 1

Some key ECT investor lawsuits against states

Corporations versus environmental protection – Vattenfall v. Germany 1 & 2: In 2009 Swedish energy company Vattenfall sued Germany, seeking €1.4 billion in compensation for environmental restrictions imposed on one of its coal-fired power plants. The lawsuit was settled in 2011 after the local government agreed to relax the restrictions, exacerbating environmental impacts the plant will have on the Elbe river, its fish stocks and aquatic life.² In 2012 Vattenfall sued again, seeking €6.1 billion (including interest) for lost profits related to two of its nuclear reactors. This ongoing case challenges the decision to speed up Germany's phaseout of atomic energy. By September 2020 it had led to €22 million in legal defence costs for German taxpayers.³

Corporations versus bans on oil drilling – Rockhopper v. Italy: In 2017 UK-based oil and gas company Rockhopper sued the Italian Government over its refusal to grant a concession for oil drilling in the Adriatic Sea. The refusal came after the Italian Parliament banned new oil and gas operations near the country's coast amid concerns for the environment, earthquake risks, and impacts on tourism and fishing.⁴ Rockhopper is demanding up to US\$350 million, seven times the amount it actually spent on developing the project.⁵ Remarkably, the claim was registered 16 months after Italy's exit from the ECT took effect. This is possible because the treaty protects existing investments for 20 more years after a country withdraws as a signatory.⁶

Corporations versus climate action – Vermilion v. France and Uniper v. The Netherlands: In 2017 Canadian oil and gas company Vermilion threatened to sue France under the ECT over a proposed law to end fossil fuel extraction on French territory, including overseas, by 2040.⁷ The threat of a lawsuit potentially contributed to watering down the law, the final version of which allows exploitation permits to be renewed after that deadline.⁸ German energy company Uniper is also using the threat of an ECT lawsuit to oppose the transition from dirty energy. In December 2019, Uniper threatened to sue the Netherlands over a law to ban the use of coal for electricity production by 2030. The company is seeking a reported €1 billion in compensation.⁹

While the ECT and those who profit from it have long escaped public attention, scrutiny has grown in recent years. Experts, trade unions, environmental, and trade-related civil society groups are calling on ECT members to withdraw from the agreement because it is “an outdated Treaty that risks undermining necessary climate measures.”¹⁰ The European Commission has called the ECT “outdated” and “no longer sustainable or adequate for the current challenges”.¹¹ Lawmakers from across Europe have demanded a fundamental rewrite of the agreement – or for it to be abandoned.¹² In the wake of its first ECT-lawsuits, Italy withdrew from the agreement in December 2014.¹³

In light of the growing controversy, ECT member states in November 2018 approved a list of topics for the ‘modernisation’ of the agreement.¹⁴ Negotiations have been under way since 2020 and are expected to take several years. While all ECT members need to agree to reform the treaty, several question the need for any change. (See section 6 for more information.)

At the same time, ECT proponents are silently pushing to expand the agreement’s geographical reach in Africa, Asia, and Latin America. As a result, many countries are expected to sign the ECT with its extreme investor privileges: Pakistan, Burundi, Eswatini (formerly Swaziland), and Mauritania (all ratifying the ECT internally), Uganda (which could be the next invitee for accession), as well as Bangladesh, Chad, China, Gambia, Morocco, Niger, Nigeria, Panama, Senegal, and Serbia (which the ECT Secretariat is supporting with their accession reports). In its 2020 work programme, the Secretariat had also envisioned outreach activities towards Kenya, Iran, and the Economic Community of West African States (ECOWAS) and was keen to target countries from South-East Asia.¹⁵ (See section 7 for more information on the expansion.)

This process is mainly driven by the ECT Secretariat and those who profit when investors sue states under the agreement: large energy corporations and specialised investment lawyers. This guide takes a closer look at these ECT profiteers in the next section.

BOX 2

The ECT in figures¹⁶

- No trade and investment agreement anywhere in the world has triggered more investor-state lawsuits than the ECT. In October 2020 the ECT Secretariat listed a total of **134** corporate claims. As proceedings can be kept secret, the actual number is likely higher.
- In recent years the number of ECT investor lawsuits has exploded. While just **19** cases were registered in the first 10 years of the agreement (1998-2007), **102** investor lawsuits are known to have been filed during the last decade (2010-2019), representing an increase of **437 per cent** in the numbers of known filed cases. This trend is likely to continue.
- A large number of known ECT lawsuits, **66 per cent**, were brought by an investor from one EU member state against the government of another EU member, claiming hefty sums of public money arguably not available to them under the EU legal system.
- **60 per cent** of known ECT cases which had been decided by October 2020 benefited the investor – either in the form of a settlement (**12 per cent**) or a ruling in favour of the investor (**48 per cent**).¹⁷
- Under the ECT governments have been ordered or have agreed to pay more than **US\$52 billion** in damages from public coffers – more than the annual investment needed to provide access to energy for all those people in the world who currently lack it.¹⁸
- Outstanding ECT claims where this information is available (only 25 out of 52 cases) have a collective value of **US\$28 billion** – equivalent to the estimated annual cost for the African continent to adapt to climate change.¹⁹
- Legal costs average **US\$4.9 million** for sued states and **US\$6 million** for claimant investors in investor-state disputes,²⁰ but can be much higher. In the ECT cases over the dismantling of the now-defunct former oil giant Yukos, they reached the sum of **US\$124 million**, of which Russia was ordered to pay nearly **US\$103 million**.²¹

THE ECT PROPONENTS

Broadly speaking, ECT supporters are comprised of four groups: first, the ECT Secretariat with its close ties to investment lawyers and energy companies and its survival depending on the continued existence of the ECT; second, lawyers and arbitrators who earn handsome fees in ECT lawsuits; third, energy companies, which can use it to get large amounts of public money and to lobby against regulations that cut into their profits; and last but not least, governments – or rather, parts of governments like energy and industry ministries, which too often cater to the profit interests of businesses investing abroad.

Faced with increasing backlash against the ECT by Parliaments and the wider public, treaty proponents have realised that clinging to the status quo is hard to defend. It has now become their ultimate objective to maintain or even expand the ECT's reach, while opening it up for cosmetic changes to appease the critics.



The ECT Secretariat

The Brussels-based Secretariat of the ECT was established in the mid-90s. Today, it has approximately 25 permanent staff²² and its €4 million annual budget is largely funded by the EU and its member states.²³

Without the ECT, the Secretariat would lose its *raison d'être*. This inherent interest in the existence of the ECT calls the Secretariat's neutrality into question. To survive, the Secretariat has taken an active role in facilitating – and thereby shaping – the process to 'modernise' the outdated treaty.²⁴ At the same time, it has been the most active body promoting the expansion of the ECT to new signatory states.²⁵ More recently, it has characterised the ECT as "a complement to the Paris agreement"²⁶ and has attempted to deflect growing negative public opinion of the ECT.²⁷

Meanwhile, the Secretariat has promoted the treaty as way for investors to receive compensation for the phaseout of fossil fuels,²⁸ while maintaining close ties to both, large energy corporations and the legal industry, which profit handsomely from the ECT.

Law firms and arbitrators

Lawyers and arbitrators make a lot of money when investors sue states under the ECT. For example, in the ECT case of *Stati vs Kazakhstan*, the arbitrator acting as President received €400.000 and the other two arbitrators €200.000 each.²⁹ If these amounts appear exorbitant, they are in fact relatively small compared to law firms' cut for representing the parties. For example, in the case of *Khan Resources vs Mongolia*, the investor reportedly spent almost US\$7 million in legal fees to the law firm Crowell & Moring. The arbitrators ordered the state to cover these costs.³⁰

It's a small group of arbitrators and law firms that profit most from ECT lawsuits. By the end of 2017, a group of 25 arbitrators rendered decisions in 44 per cent of the ECT cases. Just five elite law firms had been involved in nearly half of all known investor lawsuits.³¹

It is no surprise that lawyers who are active in ECT cases tend to defend the treaty. One example is the European Federation for Investment Law and Arbitration (EFILA), an arbitration lobby group that counts among its members law firms like King & Spalding (active in 22 ECT cases), Allen & Overy (involved in 18 ECT cases), Mannheimer Swartling (5 ECT cases) and among its board members representatives from Luther (3 ECT cases)

and Cuatrecasas (9 ECT cases).³² The lobby group has gone out of its way to defend the ECT,³³ including by publishing detailed rebuttals to critical reports.³⁴

Some of the law firms most often involved with the ECT also sit on its Legal Advisory Task Force, which supports “the work of the Energy Charter Secretariat in discussing improvements to the dispute settlement mechanisms under the Energy Charter Treaty”.³⁵ Two thirds of lawyers on the Task Force have a financial stake in investor lawsuits against states, including many that are based on the ECT.³⁶ Through this advisory group, lawyers with a vested interest in maintaining deep investor privileges have a direct way to influence the Secretariat and the ECT member states.

Energy corporations

Ultimately, the main beneficiaries of the ECT are energy corporations. They are the only ones that can initiate lawsuits and reap rewards worth millions or billions of Euros in taxpayer money and concessions like weaker environmental regulations.

Even though big energy firms have largely refrained from commenting publicly on the ECT, they exert influence behind the scenes. Energy corporations like Shell, BP, Enel, Union Fenosa, Abengoa and Uniper are part of the ECT Industry Advisory Panel.³⁷ In 2019, the Advisory Panel confirmed that in matters related to ECT “the industry is regularly consulted on important issues and that its opinion is taken into consideration when priorities are discussed”.³⁸ The terms of reference that govern the operations of this group reveal how its views and opinions are intended to shape the work of Secretariat and influence the deliberations of the ECT members.³⁹

The investors advising the Secretariat support modernisation of the ECT, as long as it translates into expanding its reach by, for example, “extending investment protection to the pre-investment stage”,⁴⁰ which would allow investors to sue even before a project gets off the ground. They further demand that the ECT’s “provisions on expropriation and procedures for fair compensation... should not be diluted in any way”.⁴¹ Also, industry argues that “there seems to be no case for additional definition of or provision for the ‘state right to regulate’”.⁴² The reforms proposed by big energy would thus make the treaty even more dangerous for people, planet and democracy.

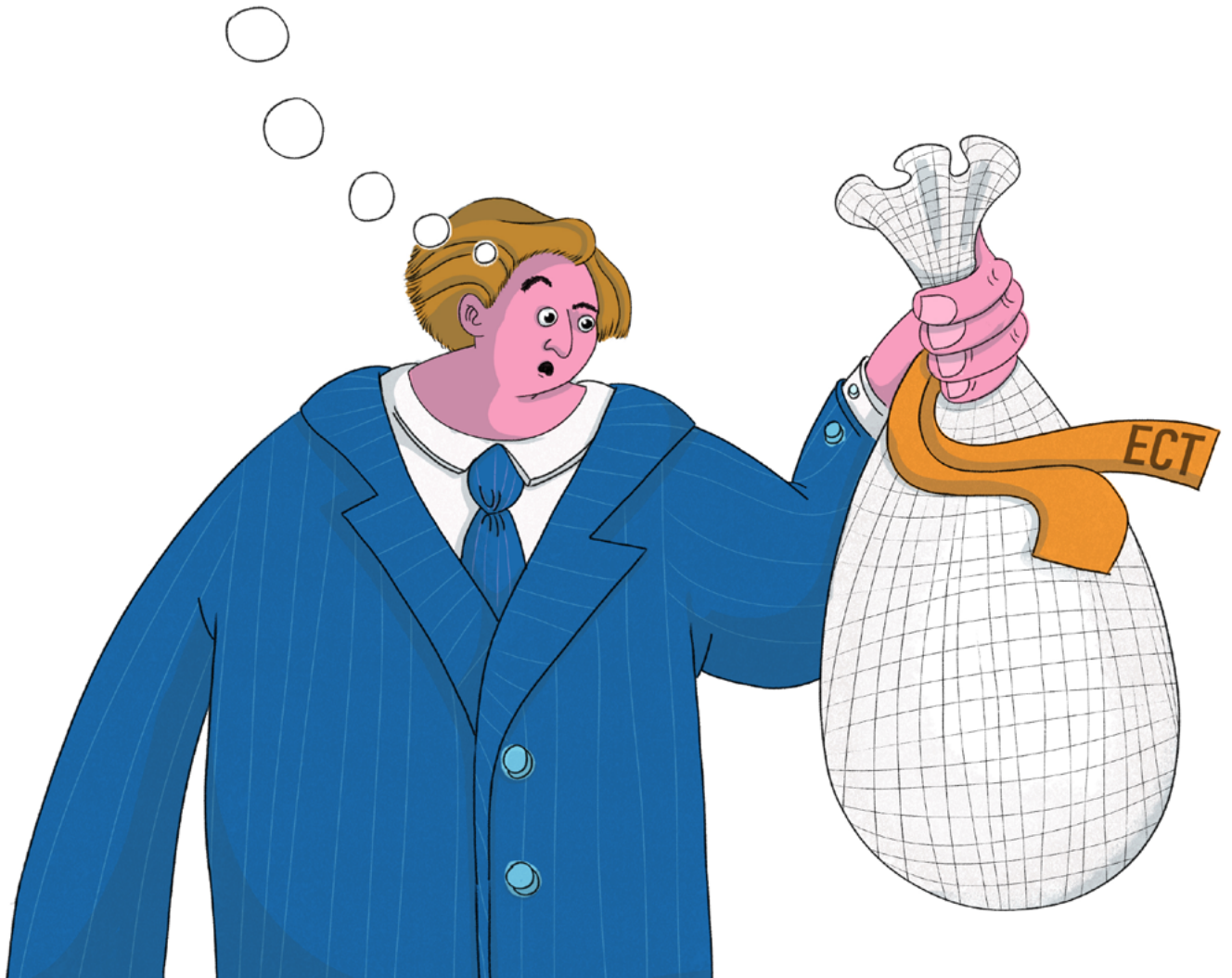
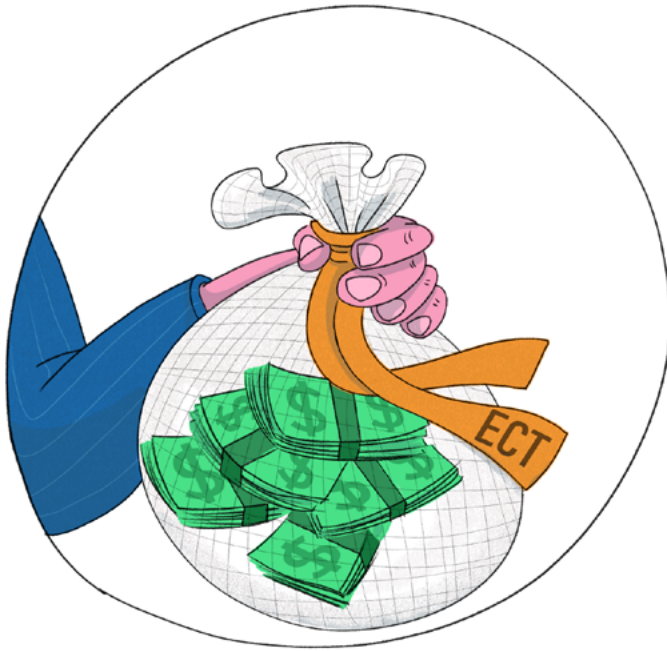
Governments

States are the signatories of the ECT. They have the final decision-making power to keep, change or terminate the treaty. Currently, no member state seems interested in getting rid of the ECT entirely. Economic affairs ministries are often particularly keen on maintaining a treaty that gives domestic investors a powerful tool to secure profits abroad. Nonetheless, governments hold divergent views on the future of the ECT.

On the one hand, Japan, with the support of energy-exporting countries like Kazakhstan, has strongly defended the status quo and rejects any major changes to the ECT.⁴³ In contrast, the European Commission and EU member states seek to reform the treaty in order to justify remaining part of an agreement that they have deemed “outdated”.⁴⁴ For this reason, EU governments have been the driving force behind the modernisation negotiations.

Facing a growing backlash against the treaty, particularly from European Parliament members,⁴⁵ the European Commission knows it needs to present some results from the modernisation negotiations that can make the ECT appear compatible with the Paris Agreement and the European Green Deal. There is, however, a serious risk that minor reforms to the ECT will be approved and presented as major changes that solve all its problems.

COUNTERING THE GENERAL PRO-ECT ARGUMENTS



Claim 1



The ECT increases foreign investment!



Reality

There is no evidence that the ECT attracts investment. Neither analysts nor investors nor government officials consider investment treaties as important drivers of investment decisions.

“ A primary aim of the Treaty is to promote the necessary climate of predictability that can attract private sector involvement. ”

Website run by the ECT Secretariat⁴⁶

“ By reducing the political risks that foreign investors face in the host country, the Treaty seeks to boost investor confidence and to contribute to an increase in international investment flows. ”

Website run by the ECT Secretariat⁴⁷

the ECT), an official explained: “South Africa does not receive significant inflows of FDI from many partners with whom we have BITs, and at the same time, continues to receive investment from jurisdictions with which we have no BITs. In short, BITs have not been decisive in attracting investment to South Africa.”⁵² This has also been the experience in other countries. In Indonesia foreign investment from the Netherlands actually increased after the country terminated its investment treaties with the Netherlands and other countries.⁵³ Ecuador reached the same conclusion after a thorough audit.⁵⁴ And Brazil is receiving the largest amount of FDI in Latin America⁵⁵ – despite being one of the few countries that has never ratified a treaty allowing for investor-state arbitration.

Studies suggest that many **investors are not even aware of the existence of investment treaties** when they decide whether or not to invest in a country. If they were aware, the treaties were not an important factor in their decision-making.⁵⁶ Specifically for wind energy investments in developing countries, research has found that regulatory support (such as access to the electricity grid) and economic factors (like feed-in tariffs) were most important for attracting foreign direct investment, while investment agreements were not among the factors listed.⁵⁷

Claim 2



The ECT promotes the rule of law!



Reality

The ECT undermines the rule of law. It supports a secretive and biased legal system accessible only to foreign investors and can undermine court systems that are actually based on the rule of law.

“The fundamental aim of the Energy Charter Treaty is to strengthen the rule of law on energy issues, by creating a level playing field of rules to be observed by all participating governments.”

Website run by the ECT Secretariat⁵⁸

“The Energy Charter Treaty... strives to be a valuable tool to promote fairness, and the rule of law in the energy sector.”

Urban Rusnák, Secretary General of the Energy Charter⁵⁹

principle of judicial independence. There is no requirement in the ECT to make the claims nor the proceedings public. Not even the ECT Secretariat is aware of all claims as they can be kept secret.⁶² Arbitrators deciding cases have strong incentives to interpret treaty provisions broadly and in favour of foreign investors, because an investor-friendly interpretation of the law will mean more case appointments, power and money for them in the future. The practice of double-hatting – the same individuals serving as arbitrators and counsel in different cases – creates further conflicts of interest as an arbitrator might interpret the ECT in a way that is beneficial for them and their clients in another case.⁶³

The characteristics of the investment resolution system embedded in the ECT run counter to the basic standards of the rule of law that ECT proponents argue the treaty will help to correct.

2. The ECT does not require investors to first bring their claims before domestic courts, a general requirement in other areas of international law like human rights law. By giving some of the most powerful actors in society a separate forum for their complaints, investment arbitration removes incentives for states to improve the quality of their domestic legal systems.⁶⁴ Research has shown that in some cases, investment treaties even had a negative impact on national legal institutions.⁶⁵

The idea that the ECT could improve the rule of law in the energy sector is fundamentally flawed. Even in terms of a narrow, procedural conception the rule of law risks being undermined by the ECT in, at least, three ways:⁶⁰

1. Two important aspects of the rule of law are equal access to justice and judicial independence. But the ECT's investment dispute resolution system:

- a) creates a **parallel legal system that is exclusively available to some of the richest and most powerful actors in society:** foreign investors. Governments, domestic investors, civil society and affected communities cannot initiate claims. As Economics Nobel Laureate Joseph Stiglitz put it in a joint letter: “To protect and uphold the rule of law, our ideals of fairness and justice must apply in all situations and equally to everyone. Investor-state dispute settlement, in contrast, is a system built on differential access.”⁶¹
- b) is **highly secretive, riddled with conflicts of interest and glaringly at odds with the**

3. The **ECT is mainly being used to sue countries with robust legal systems**. More than two thirds of ECT cases were filed against the European Union and its member states.⁶⁶ This shows how foreign investors circumvent national justice systems that are based on the rule of law to use a forum more favourable to them. The European Court of Justice decided in a landmark decision that investment cases between EU member states are illegal, because they undermine the legal order of the European Union.⁶⁷

Claim 3



The ECT is the only way to protect energy investors abroad, particularly in countries with weak judicial systems!



Reality

Investors have numerous options to protect their investments abroad, but the ECT is the most attractive because it can act like a cash machine for them. In any case, countries with weak judicial systems are not the main target of investor lawsuits.

Foreign investors have a wide array of options to protect themselves and claim their rights:

1. Foreign investors are entitled to seek compensation for alleged wrongdoings in host country courts – just like everyone else. When Vattenfall was unhappy with the German nuclear exit, for example, it sued the government in the country's highest court. The latter found Germany's nuclear exit to be constitutional but ruled that Vattenfall and others had a right to limited financial compensation for certain government actions relating to the exit.⁷¹ Despite this, Vattenfall has continued its parallel €6.1 billion ECT challenge (see Box 1 on page 5) – likely betting it will walk away with a larger windfall than it would ever be granted under German law. While Germany's constitution does not consider future profits protected property, ECT tribunals often award compensation for the hypothetical profits that an investment might have generated (see also claim 5).

2. Many options exist for investors to obtain further protections:

- a) private political risk insurance can insulate investors against risks such as confiscation, nationalisation and the cancellation of

“The underlying philosophy of the ECT is that in a dispute between the state and a foreign investor domestic courts are part of the state and that the Treaty therefore provides the only impartial dispute settlement forum available.”

Thomas Wälde (†), law professor, lawyer, arbitrator and expert in ECT proceedings⁶⁸

“Arbitration has long been a favoured mechanism to ensure investors' independence from possible pro-state bias in the courts.”

Andrei V. Belyi, former member of the ECT Secretariat⁶⁹

“It may be difficult in some countries to ensure that the rule of law is applied by domestic courts... in an impartial and independent way.”

Investment arbitration lobby group EFILA⁷⁰

contracts;

- b) the World Bank's Multilateral Investment Guarantee Agency (MIGA), which provides guarantees for investors against losses caused by risks such as expropriation, currency inconvertibility, currency transfers, civil war or unrest;
- c) insurance offered by the investor's home country. Most countries that export capital provide insurance to companies that invest abroad, similar to what the World Bank offers.⁷²

3. Typically, an **investor can negotiate access to investor-state arbitration in contracts with the host state relating to a specific investment project**. The government can then assess if offering that possibility is justified for the specific investment instead of giving a blank check to all foreign investors from all 50-plus signatory states under the ECT.

Regardless, countries with weak judicial systems are not the main target of the ECT (or other investment treaty) claims. Globally, **most investor-state lawsuits are brought against democratic countries with strong rule of law**. A 2014 study found that from the mid-1990s onwards, most "investment arbitrations have been filed against governments exhibiting, on average, a relatively high level of democratic development and rule of law".⁷³ This is also the case when it comes to the ECT. More than two thirds of known ECT cases were filed against the European Union and its member states.⁷⁴ This demonstrates how the ECT is less a tool to get justice in countries with weak legal systems, but rather a way to get guaranteed profits (see also claims 2 and 5).

Importantly, there is also **no sound evidence of systematic bias against foreign investors** that would require the existence of special tribunals only available to them. To the contrary, a study on the treatment of foreign investors in developing countries found the experiences of foreign firms at the hands of host governments "tend to be as good, or better, than those reported by their domestic counterparts."⁷⁵ The relative better treatment of foreign over domestic investors is greatest in low-income countries – purportedly those with weak domestic legal systems. As the authors of the study conclude: "There is a political advantage, as opposed to liability, of being a foreign firm."⁷⁶

Claim 4



States win the majority of ECT cases!



Reality

The majority of ECT cases lead to favourable results for the claimant investors. In almost 60 per cent of resolved cases, investors either received monetary compensation or other concessions as part of a settlement. In addition, there is an abundance of cases that never went to arbitration because investors already got what they wanted by threatening an expensive claim, further demonstrating the pro-investor nature of the ECT.

Investors only received compensation in 44% of the ECT cases they started.

Statistic published by the ECT Secretariat⁷⁷

The statistics that only count monetary compensation are misleading because they miss crucial ways in

which the ECT benefits investors and adversely affect governments' regulatory powers:

1. The majority (60 per cent) of ECT lawsuits decided by a tribunal have favoured the investor either because the tribunal ruled in its favour or because there was a settlement, which is likely to have included some kind of benefit for the investor.⁷⁸ In the case of ECT suits against Spain, for example, the tribunals sided with investors in 86 per cent of cases.⁷⁹ It is worth noting that, under the ECT, states can never really "win" – at best they can hope to not have to pay compensation to an investor.

The reason settlements should be counted in the investors' favour is that they are a way for investors to get what they want. Filing a claim can be an instrument to pressure a government to soften or withdraw a planned law or regulation. The Swedish energy company Vattenfall, for example, sued Germany after the city of Hamburg introduced stronger water protection measures that would have affected its coal-fired power plant. Vattenfall demanded more than €1 billion in compensation via the ECT but settled the claim after the city agreed to weaken its water regulation (see Box 1 on page 5).⁸⁰ Local politicians have admitted that the city was bullied into relaxing its environmental rules with the high compensation claim. As one law firm describes it: "In considering whether to bring a claim... investors should bear in mind that around 30 to 40 per cent of investment disputes typically settle before a final award is issued. Commencing a claim can create leverage to help the investor reach a satisfactory result."⁸¹

2. Sometimes, investors do not even need to file a claim to get what they want. In 2017, for example, Canadian oil and gas company Vermilion threatened to sue France under the ECT over a proposed law to end fossil fuel extraction on French territory by 2040. The threat likely contributed to watering down the law, the final version of which allows exploitation permits to be renewed after that deadline (see Box 1 on page 5).⁸² Another example is the German coal phaseout, for which the German government is promising coal companies €4.35 billion in compensation. Experts say one reason for this excessive sum could be that the companies waived their rights to challenge the coal exit under the ECT in return.⁸³ As a specialised arbitration lawyer told a reporter: "I do a ton of work that involves threatened claims that never go to arbitration... That's much more common... It's much better to get things done quietly."⁸⁴

Claim 5



Investors win
much less money
than they claim!



Reality

Investors often inflate the amount of money they initially claim to drive up the compensation they might receive in the end. The methods used to calculate compensations also favour investors.

Tribunals often order states to pay significantly less compensation than claimed by the investor. In one third of all known cases where a state was ordered to pay compensation, the sum was less than 30 per cent of what the company had originally claimed.

The pay-outs investors receive when winning an ECT case vary considerably. Sometimes investors get almost 100 per cent of the amount they have claimed. In other cases, it is closer to 10 per cent. But serious problems exist with the way compensation is claimed and calculated in investment arbitration cases:

1. Investors often inflate their initial claim enormously to increase the compensation they receive at the end. A leading investment arbitration lawyer describes the strategy this way: “a claimant starts out with an outrageous demand in order to make a lower but still outrageous figure appear reasonable.”⁸⁶ The strategy used by the mining company Khan Resources is a prime example. Khan Resources sued Mongolia after the country revoked licenses for its mining operations due to breaches of a new nuclear safety law. The company demanded US\$326 million in compensation under the ECT even though it had only invested between US\$16.7 and US\$50 million in the project (the exact amount is disputed).⁸⁷ The strategy succeeded and Mongolia was eventually forced to pay US\$70 million in compensation – a windfall profit of at least US\$20 million for the investors.⁸⁸ Yet in the statistics of the ECT Secretariat, Khan Resources appears as only having won 24.5 per cent of their initial claim.⁸⁹

2. A common method used by arbitration tribunals to calculate the value of an investment is tilted in favour of investors. Instead of determining how much money an investor has actually invested, tribunals increasingly award compensation based on the future profits that an investment might have generated.⁹⁰ The growing use of this calculation method is seen as “a key factor driving the increase in compensation in investment treaty disputes over the past two decades.”⁹¹ One expert remarked that this way of calculating compensation payments is “tainted by misapplication, and it has been used to justify valuations which reach beyond the ‘fanciful’ to ‘wonderland proportions’.”⁹² International law professor Robert Howse has called it “junk science”.⁹³ Unsurprisingly, investors in many cases correctly speculate that an arbitration lawsuit will give them a higher payout than a national or international court would. An instructive example is the ECT case with the highest award in any investment arbitration proceeding so far. An arbitration tribunal ordered Russia to pay former shareholders of the oil company Yukos US\$50 billion in compensation. Yukos shareholders also went to European Court of Human Rights to claim compensation in the same matter. Here they won €1.9 billion – less than 5 per cent of what they were awarded under the ECT.⁹⁴

Claim 6



The ECT is most often used by small and medium-sized enterprises (SMEs)!



Reality

“The majority of all investment disputes under the Treaty are brought by small or medium enterprises (approx. 60%).”

ECT Secretariat⁹⁵

By October 2020, 261 SMEs had been claimants in ECT cases, while only 7 cases had been brought by large corporations.

Statistic published by the ECT Secretariat⁹⁶

The ECT Secretariat uses a flawed and misleading definition of SMEs that includes large multinationals to claim that the majority of ECT cases are brought by SMEs. This is not the case. Because of its high costs, long proceedings and a lower chance of winning (compared to large corporations), investment arbitration is not an attractive option for SMEs.

The ECT Secretariat’s claim that SMEs are the main users of the treaty is highly misleading. In its statistics, the Secretariat defines an SMEs as any

company that is not one of the world's 250 largest energy companies.⁹⁷ Hence **a lot of large corporations get classified as SMEs**. For example, the Swedish energy giant Vattenfall, which started two ECT cases against Germany, passes as an SME, despite having 20,000 employees and making an annual profit of almost €1.5 billion.⁹⁸ Similarly, the Belgian electricity company Electrabel, which sued Hungary under the ECT, posted a revenue of €18.7 billion and pre-tax profits of €3.3 billion in 2018 while counting as an SME.⁹⁹ Unsurprisingly, this definition of SMEs runs counter to the one used by the European Commission, which defines SMEs as enterprises with either fewer than 250 employees or annual revenue less than €50 million.¹⁰⁰

A survey carried out a few years ago among actual SMEs showed that very few see investment arbitration under treaties like the ECT as an important tool and more than a third think such treaties could disadvantage them vis-a-vis foreign competitors.¹⁰¹ There are several reasons why solving disputes in international arbitration tribunals is not popular with SMEs:

1. Costs: investment arbitrations are very expensive. They **cost the claimant investors on average US\$6 million**, with the largest amount spent for lawyers.¹⁰² In almost half of ECT cases that were concluded, each party had to pay for their own costs, even if they won.¹⁰³ That's much harder to shoulder for an SME than a multinational corporation and becomes pointless if the compensation claim is smaller than the potential costs of bringing it.

2. Length: it takes four years on average to decide an investment arbitration case (which contributes to the high costs).¹⁰⁴ Many SMEs don't have the resources to wait so long until a verdict is reached, especially since average cases in national courts of EU countries are resolved faster.¹⁰⁵

3. Chances: SMEs have a **lower rate of winning investment arbitration cases than large corporations**. A study that analysed all known and publicly available awards as of 2015 found that small companies have a success rate of 45.5 per cent. Medium-sized companies won 55.6 per cent of cases while large corporations won 70.8 per cent.¹⁰⁶ The same study reported that the beneficiaries of compensation payments ordered by investment arbitration tribunals "in the aggregate, have overwhelmingly been companies with more than US\$1 billion in annual revenue – especially extra-large companies with more than US\$10 billion".¹⁰⁷

As a journalist who tracks investment arbitration cases remarked: "Whatever one thinks of investor-state dispute settlement – this is not a system that is much used by genuinely small claimants to obtain justice."¹⁰⁸

COUNTERING CLAIMS THAT ECT HELPS COMBAT CLIMATE CHANGE



Claim 7



Thanks to the ECT
more capital will flow
into clean energy!



Reality

Investment treaties are not an important factor for renewable energy investors.

As shown in claim 1, **there is no evidence that a treaty like the ECT actually increases investments.** In fact, the ECT does not include provisions that would particularly stimulate investment in renewable energies, for example, by providing more favourable treatment to low-carbon energy investments.

For renewable energy investors treaties like the ECT are not an important consideration as a 2019 survey by Bloomberg New Energy Finance has shown. It ranked the attractiveness of more than 100 countries in the Global South for investments in renewable energy.¹¹² The best-ranked country, India, recently terminated most of its investment treaties and developed a new model that significantly reduces rights provided to investors.¹¹³ Brazil, ranked third, has never signed a treaty that would allow investors to sue the country in private arbitration tribunals.¹¹⁴ The existence of investment treaties was not among the 167 indicators taken into account for the assessment. Similarly, the International Energy Agency's reports do not mention investment treaties when talking about what is needed to increase investment in renewables.¹¹⁵

An international treaty designed to support the energy transition and the roll-out of renewable energy sources would look very different from the ECT. It would support its signatories in increasing their targets on renewable energy generation and greenhouse gas reduction in a coordinated way.¹¹⁶ It would also increase the support for renewable energy generation by explicitly allowing certain green industrial policy measures, such as local

employment requirements, that have come into conflict with trade and investment agreements in the past. At the same time, such a treaty would oblige states to enforce existing international environmental agreements, to establish effective carbon pricing and phase-out fossil fuel subsidies.¹¹⁷ Such measures could truly help to advance the transition to renewable energies, but they are not being discussed in the negotiations for renewing the ECT (see also claim 11).

“The... stability, transparency and predictability which underpin the Energy Charter Process provide the basis that investors, businesses and policy-makers need to confidently accelerate investment decisions in cleaner technologies and energy efficiency.”

Website of the ECT Secretariat¹⁰⁹

“The ECT is not a panacea for solving climate change, but it has the potential to be an effective tool in the toolbox of a government with the political will to attract investment in green energy.”

Investment arbitration lobby group EFILA¹¹⁰

“The Paris Agreement and UN Sustainable Development Goals require huge investment in sustainable energy sources. But the Paris Agreement does not protect energy investment, trade or energy transit. This is where the Energy Charter Treaty can play a key role.”

Urban Rusnák, Secretary General of the Energy Charter¹¹¹

Claim 8



The ECT does not favour fossil fuels – it protects all types of energy equally!



Reality

“The ECT is technology neutral”

Investment arbitration lobby group EFILA¹¹⁸

“The Treaty is neutral. It protects all energy investments, fossil fuels, renewables, nuclear.”

Urban Rusnák, Secretary General of the Energy Charter¹¹⁹

Far from neutral, the ECT protects existing investments, most of them in fossil fuels.

The ECT Secretariats openly advertises the fact that the ECT is “technology-neutral” – that it treats all energy sources equally, regardless of whether they are renewable or fossil fuels.¹²⁰ Yet, what the ECT does is protect existing investments – and most of them are in fossil fuels or nuclear energy. Even during 2013-2018, when investments in renewable energy were unusually high, they comprised only 20 per cent of new investments covered by the ECT. In comparison, **fossil fuel investment represented**

56 per cent of the new investments covered by the ECT.¹²¹ This is in line with global trends where, in 2020, 23 per cent of investment in the energy supply was in renewables, while fossil fuels comprised 55 per cent, around US\$700 billion (the remaining share went into electricity grids and nuclear power stations).¹²² Giant subsidies for fossil fuels are estimated at US\$5.2 trillion globally and US\$289 billion in the EU per year.¹²³

The continuing investment of enormous sums in fossil fuels and their support through government subsidies is particularly worrying because the **ECT shields investors from government actions that could reduce the value of their investment.** But to reach targets under the Paris Agreement, governments have to take rapid, decisive action to reduce the extraction and consumption of fossil fuels. This includes shuttering coal mines and power stations, reducing consumption of oil and natural gas, as well as cutting fossil fuel subsidies. In 2015 it was estimated that “a third of oil reserves, half of gas reserves and over 80 per cent of current coal reserves should remain unused” to have a 50 per cent chance of staying below a global temperature increase of 2°C.¹²⁴ If governments get serious about this, investments in fossil fuels and fossil fuel infrastructure will quickly lose value – and investors can resort to the ECT to demand enormous amounts of compensation. This is exactly what ECT supporters see as the treaty’s advantage. The Secretary General of the ECT has even promoted it as a tool for investors to receive compensation for fossil fuel infrastructure that has to be phased out earlier than initially planned.¹²⁵

Experts have developed proposals to reform the ECT that would solve these problems and bring it in line with the Paris Agreement. Such a reformed ECT would “expressly discriminate between carbon-intensive energy investments, which should receive less favourable treatment and ultimately be eliminated, and low-carbon energy investments, which should be encouraged.”¹²⁶ There are also proposals to use investment treaties to actively roll back fossil fuels, for example, through provisions that oblige states to no longer allow new unsustainable investments, curtail existing ones, and eliminate incentives for fossil fuels such as subsidies and export credits.¹²⁷ But these proposals are not on the table in the negotiations on the ECT reform (see also claim 11).

Claim 9

The ECT protects the climate by holding governments accountable to their commitments on renewable energies!



Reality

National and European courts are a far more suitable and equitable venue to hold governments accountable.

Support schemes for renewable energies are important for the energy transition, but they need to be flexible and designed in a way that allows for adjustments. Recently, for example, costs for renewable energy production have fallen rapidly: Wind energy became 70 per cent cheaper and costs for large solar projects fell 89 per cent in the last 10 years.¹³¹ Especially in times of an economic or budget crisis, governments need the flexibility to adjust support schemes, to balance different needs and responsibilities. Otherwise, they might be even more hesitant to give subsidies to renewables in the first place. If, however, governments suddenly withdraw or reduce support for renewables these actions can have negative consequences for renewable energy investors, whether they are local communities or large investment funds. But the ECT is not the right instrument to protect renewable investors and secure the energy transition:

1. Countries' climate commitments should be enforced in a fair, independent and transparent legal regime. Arbitration under the ECT is the exact opposite: it is only accessible to some of the richest actors in our society (foreign investors), it is a highly secretive process (as claims can be kept fully veiled and very little information is publicly available when proceedings are known) and arbitrators are under a strong incentive to side with investors (as they can earn higher sums the more cases investors bring). **Domestic and European courts**, on the other hand, **offer a fair and effective means to hold governments accountable to their climate commitments** because they afford everyone, from local communities to foreign investors, equal access. Most national legal systems are also designed to consider different societal sectors and interests. In contrast, the investment arbitration system has been built to solely serve the interests of foreign investors.

“The ECT is so far the only multilateral mechanism that can be used by investors operating in other countries to defend their rights against unexpected and unjustified attempts to reduce national support for renewables.”

Former ECT Secretariat member Andrei V. Belyi¹²⁸

“It is thanks to the ECT that investors in renewable energy have been able to recoup some of the damages they have suffered due to the sudden change in the regulatory framework.”

Investment arbitration lobby group EFILA¹²⁹

“Statistics of ECT-based arbitration cases show that most claims are related precisely to renewable energy sources development projects... (The) ECT today first of all protects renewable energy sources... from unilateral worsening of investment climate by host countries, primarily EU-members.”

Andrey Konoplyanik, advisor to Gazprom and former Deputy Secretary General of the ECT Secretariat¹³⁰

2. At European level, progress has been made to fix the problem of retroactive changes to renewable subsidies. The revised **EU Renewable Energy Directive prohibits countries from changing their support schemes retroactively in an unpredictable manner**,¹³² and can be enforced in national and European courts. This is much fairer because these rules apply to and can be relied upon by everyone equally – foreign as well as domestic investors and local communities.

3. The ECT only protects foreign companies that invested in renewables, it **does not protect local companies or national investors**. And yet local communities, municipalities, and cooperatives are important drivers of the energy transition. The two European countries which have installed most renewable energy since 2009, Denmark and Germany, for example, have high citizen participation in the transition: in Denmark, for instance, the developers of wind projects must be at least 20 per cent owned by local communities.¹³³ These small-scale energy projects often enable the local support needed to roll out renewable energies, because they tend to benefit the local economy more.¹³⁴ The foreign companies that have used the ECT, on the other hand, are usually the ones that need least protection (because they have other sources of insurance, see claim 3) and least deserve it (for example, because they are highly speculative investors, which also make money with fossil fuels, see claim 10).

4. The ECT can award money to foreign investors if ECT clauses have been breached but cannot force governments to adopt better climate policies. **National courts, however, have been used to force governments to adopt stricter climate policies and targets**¹³⁵ – the best way to support a fast roll-out of renewable energies in a fair and equitable manner.

Claim 10



Many renewable energy investors have been harmed in Spain – and elsewhere – and the ECT is the only avenue for them to pursue justice!



Reality

The majority of investors that sued Spain under the ECT were investment funds or mailbox companies that made speculative investments. The fact that these companies could win large compensation awards after their own risky investment decisions took a bad turn, while thousands of Spanish renewable energy firms are still trying to recoup losses at national courts, reveal serious flaws in the ECT and investment arbitration more broadly.

Spain is the most sued country under the ECT. Forty-seven cases had been filed against the country as of October 2020, all challenging cuts to government subsidies in the renewable energy sector.

“ States, such as Spain... have withdrawn incentives or subsidies that were offered. Such regulatory changes have had a detrimental impact on the development and growth of renewable energy. There may be minimal, or indeed no scope, for any remedies for these investments in the relevant national legal system ”

Advice given by the investment law firm Baker McKenzie¹³⁶

“ Investors in the renewable energy sector are now confronted with a difficult situation in several European countries. Although domestic remedies hold little promise, foreign investors have viable options under international investment treaties.”

Investment arbitration law firm King & Spalding¹³⁷

“ Governments around the world have recently curtailed their incentive schemes for green energy producers...The type of the risk involved in these measures, i.e. political and legislative risk, is typically considered to be immune from standard legal actions available to aggrieved business, at least on a domestic level. International investment treaties may however provide an option for certain parties adversely affected.”

Investment arbitration law firm K&L Gates¹³⁸

determined the cuts to renewable subsidies were legal.¹⁴¹ They rejected the request for compensation from more than 60,000 Spanish families that were affected.¹⁴² This creates an unfair, two-tier system, where wealthy investors are treated better than anyone else.¹⁴³ Foreign investors have benefited from the subsidies granted by a special renewable energy regime without assuming the same business risk as the rest of the renewable investors.

2. At least half of the companies suing Spain invested in the country after the 2008 economic crisis had started and the government had introduced the first changes to the renewable subsidies.¹⁴⁴ While these investors should have been fully aware of the risks, they later argued that Spain violated their “legitimate expectations” when cutting the subsidies.¹⁴⁵ Arbitrators have repeatedly accepted this argument, even though they were aware that some investors had knowledge of the changing regulatory environment at the time of the investment.¹⁴⁶ **Speculative investors** using the ECT to claim large payouts despite knowing that subsidies would be cut when they invested is not a sign of justice, but an example of rewarding risky, bad investments that went sour.

3. The vast majority of investors that have sued Spain are investment funds that poured money into the Spanish renewables sector in search of high returns.¹⁴⁷ In 85 per cent of the 47 ECT lawsuits, the claimant investor is an **equity fund or other type of financial investor, many of them also investing in dirty energy projects**, such as coal, oil, gas and nuclear energy.¹⁴⁸ The money Spain has to pay could thus easily end up in the pockets of shareholders or finance fossil fuel projects.

4. Thanks to the ECT’s overly broad definition of “investor” and “investment”, **mailbox companies** (firms with hardly any employees set up to shift profits and avoid paying taxes) have been able to sue Spain repeatedly. In 10 out of the 11 cases where a Netherlands-based investor was suing, the claimant was a mailbox company.¹⁴⁹ For example, ‘Dutch’ companies Isolux Infrastructure and Charanne, which both sued Spain under the ECT, are mailbox firms by Spanish businessmen Luis Delso and José Gomis, once two of Spain’s richest people.¹⁵⁰ The Spanish Tax Agency accused Delso and Gomis of tax avoidance and condemned them for fiscal fraud.¹⁵¹ While a technicality set them free¹⁵² they are currently under investigation for alleged fraud¹⁵³ and corruption in other cases.¹⁵⁴

More than one billion Euros have been awarded to investors against Spain, money that is now missing for the actual support of renewables.¹⁵⁵ The Spanish government recently offered renewable energy investors a guaranteed return of more than 7 per cent for their investments over a period of 12 years, if they drop their ECT cases in return.¹⁵⁶ While the Spanish associations for solar and wind energy reacted positively to the offer,¹⁵⁷ a lawyer said it “amounted to ‘petty money’ compared to the amounts investors stood to gain through litigation.”¹⁵⁸ This might explain why, so far, only few investors have accepted the government offer.¹⁵⁹ Since the ECT allows for compensation for hypothetical future profits, it is often a much more lucrative option to earning a regular return on an investment. This shows that investors do not necessarily need the ECT to win justice, but rather to secure guaranteed profits.

In the 2000s, the Spanish government had set up a generous incentive scheme for renewables, which attracted a large number of financial investors.¹³⁹ But, in the midst of a harsh financial crisis, and succumbing to lobbying from large utilities,¹⁴⁰ the conservative government rolled back price guarantees for renewable energy producers, arguing they had become too costly. This decision hurt the energy transition, the climate and consumers who saw higher electricity bills. It also meant financial disaster for many ordinary people, small and medium enterprises and municipalities that had also been attracted by the subsidies and invested accordingly. But this does not mean that the renewable claims are an argument in favour of the ECT. A close examination of the companies that used the ECT to sue the Spanish government shows that this instrument is providing “justice” to the wrong kind of investors:

1. The ECT left **small Spanish investors out in the cold** because, even though they suffered from the same cuts, they can’t claim compensation in international arbitration tribunals. Both the Spanish Supreme Court and the Constitutional Court

COUNTERING CLAIMS THAT THE ECT'S MODERNISATION WILL FIX ITS FLAWS



Claim 11

Modernisation will bring the ECT in line with climate goals!



Reality

The chances that the ECT modernisation would bring the treaty in line with climate goals are extremely low. The proposals currently on the table will continue to protect fossil fuels from government regulation. And because amendments to the treaty require unanimous agreement from all members, only cosmetic changes are expected.

There are strong indications that the modernisation of the ECT will not align it with climate goals:

1. The chances of fundamentally changing the ECT are very low. Any changes to the ECT require unanimity, but there is **no agreement among member countries that the treaty needs to be reformed at all**. ECT members such as Japan have already stated that they see no need for any amendments.¹⁶³ An internal European Commission report from 2017 considered it “not realistic”¹⁶⁴ that the ECT will be amended. Yet, to bring the ECT in line with the Paris Agreement and thwart the danger of its investment protection provisions, a complete treaty overhaul is needed.

2. The **protection of fossil fuels is set to continue for many years**. No ECT member state has publicly made proposals that would promptly exclude fossil fuels from the modernised treaty. The European Commission has proposed to continue protecting all existing fossil fuel investment into the 2030s and some even longer.¹⁶⁵ But research has shown that

the use of fossil fuels would already have to be drastically reduced by 2030 if the EU wants to meet commitments made in the Paris Agreement.¹⁶⁶ Yet, it is unlikely that even these timid and insufficient proposals will find the required unanimity among ECT member states, many of which are heavily dependent on fossil fuel exports.

3. The ECT’s vast investor privileges and the **biased investment arbitration tribunals are here to stay**. No ECT member state has proposed removing the mechanism from the ECT or requiring investors to bring their claims in local courts first. The same for-profit arbitrators who earn more the more ECT cases are filed and whose rulings have favoured investors in the past would continue to decide if a state has breached the treaty

“The purpose of the reform of the Energy Charter Treaty is to bring sustainable development and climate change to the forefront.”

Investment arbitration law firm Aceris Law¹⁶⁰

“If the EU succeeds with its ambitious proposal, the ECT could be the greenest investment treaty ever negotiated.”

Assessment of the EU’s modernisation proposal on a popular investment arbitration blog¹⁶¹

“In one or two years I expect to have a new Energy Charter Treaty as complement to the Paris climate agreement.”

Urban Rusnák, Secretary General of the Energy Charter, on the modernisation process¹⁶²

and needs to pay compensation (see also claim 13).¹⁶⁷

4. Expanding ECT protection to more energy sources, as the EU suggests,¹⁶⁸ **risks even more lawsuits over sustainable policies.** Technologies like hydrogen and biomass are not per se clean and their use for the energy transition is unproven at best. Regarding hydrogen, the European Commission's proposal doesn't distinguish between hydrogen produced with fossil and renewable energy. Biomass is associated with multiple environmental and social risks. ECT members risk expensive lawsuits if they protect these technologies and realise later they have to raise sustainability standards.¹⁶⁹

While time is running out for climate action, the **ECT negotiations are progressing at a snail's pace.** The process to modernise the ECT was launched in 2017,¹⁷⁰ but negotiations only started in 2020. In the three negotiation rounds that took place in 2020, no tangible progress resulted.¹⁷¹ More than 115 MEPs and 160 MPs from different EU member states have warned that the modernisation process cannot carry on for years while climate change is accelerating at breakneck speed.¹⁷² As energy expert Yamina Saheb, a former employee at the ECT Secretariat, put it: "The potential outcomes of ECT modernisation, if any, will be rather marginal compared to the challenges raised in more than two decades of the existence of the ECT."¹⁷³

Before the ECT negotiations started, experts and academics developed a model for what an international treaty on clean energy and investment would look like.¹⁷⁴ Yet, their proposal is so far away from what could be achieved through the ECT modernisation negotiations that its adoption would be much more likely if like-minded countries came together and started afresh rather than trying to reform the ECT.

Claim 12



Integrating states' 'right to regulate' in the ECT will shield public policies from investor lawsuits!



Reality

“The modernised ECT should explicitly reaffirm the so-called 'right to regulate', i.e. the right of the contracting parties to take measures for the protection of health, safety, the environment and other public policy objectives.”

Council of the European Union¹⁷⁵

The EU's proposal on the right to regulate is smoke and mirrors. It would not shield climate action and other public policies from costly – and potentially successful – investor lawsuits.

The EU's proposal for modernising the ECT includes flowery language on countries' right to regulate. Signatory states should "reaffirm the right to regulate within their territories to achieve

“ This re-affirmation of the right to regulate is supposed to, amongst other things, provide states with the necessary scope for measures to implement the energy transition.”

Ulrich Nussbaum, State Secretary, German Ministry for Economic Affairs & Energy¹⁷⁶

“ The European Union recently has proposed modernizing the ECT’s investment chapter, which, if adopted, will... make investor claims far more difficult... (including through a) substantial fortification of host states’ right to regulate.”

Investment arbitration law firm Winston & Strawn¹⁷⁷

“radically altered” its support scheme for renewable energy: Spain “crossed the line” and “violated the obligation to accord fair and equitable treatment ... when the prior regulatory regime was definitively replaced by an entirely new regime”, the tribunal argued.¹⁷⁹ **Re-affirming the right to regulate** in the ECT, while keeping its vast investor privileges intact, **will neither stop ECT challenges against legitimate public policies nor prevent arbitrators from ruling against states.** This also means that the risk of regulatory chill – avoiding lawsuits by appeasing investors with less regulation – remains, including in the context of the climate emergency.

2. The proposed text does not constitute a carve-out for decision-making in the public interest. A carve-out would simply have stated that public interest measures such as environmental or social protection do not breach the ECT’s investor rights. It is noteworthy that the EU’s negotiation proposal contains such clear language on the issue of subsidies, where “a decision not to issue, renew or maintain a subsidy... shall not constitute a breach” of the ECT.¹⁸⁰ Apparently – and worryingly – the EU has no intention to shield public interest measures, like climate policies, from ECT claims in such an unambiguous way.

Commenting on the EU’s right to regulate approach elsewhere, Canadian law professor Gus van Harten has argued that it “is pretending to protect the right to regulate” while not addressing the real problems. “The text on this point is a good case study for how legal language can be written in ways that may give a false impression of security to the uninitiated,” van Harten said.¹⁸¹

legitimate policy objectives, such as the protection of the environment, including combatting climate change...”. Also, the ECT’s foreign investor rights “shall not be interpreted” as countries’ commitment to “not change the legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor’s expectations of profits.”¹⁷⁸

A closer look at this text finds it misleading and providing a false sense of security:

1. The key question in ECT proceedings is *not* whether states have a right to regulate. They do. Several ECT tribunals have confirmed that. The key question is whether states violate the ECT’s investor rights when regulating. In other words: states are free to regulate how they want – but somewhere down the road they can be ordered to pay billions in taxpayer money, if a tribunal finds that a new law treated an investor ‘unfairly’. In one of the ECT cases that Spain lost, for example, the tribunal confirmed that “the state has a right to regulate, and investors must expect that the legislation will change”. But it still ruled that Spain had violated the ECT when it

Claim 13

The modernisation will bring the ECT in line with the EU's investment policy!



Reality

The ECT modernisation process, even if successful, will not alter the old, biased investment arbitration mechanism, which even the European Commission has called "outdated".

“Modernisation of the investment protection part of the ECT (including dispute settlement) remains an EU priority.”

European Commission¹⁸²

“Our objective is to bring this treaty in line with modern investment protection rules, and by this I mean not just the substantive rules, but also aspects of dispute settlement.”

Carlo Pettinato, European Commission¹⁸³

“The EU has been promoting... a reformed approach to investment dispute settlement... The Investment Court System (ICS) is an institutionalised adjudicative body... which replaces the old model of arbitral tribunals established ad hoc for specific disputes... The EU is engaged in a process of modernisation of the Energy Charter Treaty (ECT) which includes bringing the... dispute settlement mechanism in line with the EU modernised approach.”

European Commission¹⁸⁴

According to the EU Commission, “the ECT’s investment protection provisions have not been updated since the 1990s and are now outdated compared to the new standards of the EU’s reformed approach on investment policy”.¹⁸⁵ But the ECT modernisation will not solve this problem:

1. It is unclear if the topic will even be discussed as part of the reform process: The ECT’s dispute settlement mechanism is not on the list of agreed subjects for the negotiations.¹⁸⁶ When the EU proposed including it, other countries balked.¹⁸⁷ As it currently stands, **the ECT’s arbitration mechanism will not be discussed, let alone changed.**

2. Even if other ECT members agreed to discuss the issue, the **EU’s negotiation proposal falls behind its own new standard.** In all agreements it has concluded recently, the EU has insisted on adopting a system where the arbitrators deciding cases are no longer picked by the disputing parties but chosen from a list of pre-appointed people. It has also established a mechanism that allows investors and states to appeal a decision. But these central features of the EU’s new approach (which otherwise maintains most flaws of the investment arbitration system¹⁸⁸) are missing from its ECT reform proposal. So even if the EU’s proposals were adopted, the same for-profit arbitrators would run the proceedings and decide on compensation payments with no possibility of appeal.

3. Through the modernisation negotiations, the EU is trying to gain acceptance among ECT members for solving investment disputes at a hypothetical

multilateral investment court. This is a project currently under negotiation in the United Nations Commission on International Trade Law (UNCITRAL) and **could take many years, if ever, to establish.**¹⁸⁹ While the proposed court received much criticism from civil society,¹⁹⁰ it is highly unlikely that should it be established, all ECT members would participate in it.

This means that for the foreseeable future the interpretation of the ECT and decisions about whether and how much compensation states have to pay will be left to the very same arbitrators, who have shown a lot of support in the past for rewarding investors. Research has shown that investor rights – vague terms such as fair and equitable treatment – have been interpreted expansively by investment arbitrators at the expense of governments’ ability to regulate in the public interest.¹⁹¹ There is no reason to believe this would not happen with a reformed ECT.

Claim 14



Leaving the ECT is not an option as any country that leaves risks being sued for 20 more years – so it's better to engage!



Reality

By leaving the ECT, whether individually or jointly, countries can significantly reduce the risk of new investor lawsuits, which is much preferable to waiting for outcomes from a modernisation process that is bound to fail.

It is true that the ECT contains a “sunset clause” (Article 47 (3)), which says that the ECT’s investor privileges will continue to apply for 20 years after a country has decided to withdraw from it. This kind of lock-in highlights how democratic decision-making is being curtailed by the ECT.

But **despite the sunset clause, a withdrawal does significantly reduce a country’s risk of being sued** under the ECT, because the clause only applies to investments made before leaving the ECT. For investments made after the exit date, no new cases under the ECT are possible. For example, Italy, which decided to withdraw in 2016, continues to be sued under the ECT, but only investors that were in the country by 2016 have the option.

“A unilateral withdrawal from the Treaty becomes nonsensical in terms of avoiding compensations.”

Andrei V. Belyi, former member of the ECT Secretariat¹⁹²

“We have the ECT as it is. We have a sunset clause of 20 years. Even if today we walk out because we don’t like it, we’re stuck for 20 years with investors under the current rules... We don’t want that. We want to change it, we want to reform it.”

Carlo Pettinato, European Commission¹⁹³

And withdrawing from the ECT is not difficult. As soon as a country has been a member for five years, it can leave the ECT at any time by simply giving written notification. This is true for all but two¹⁹⁴ of the treaty's 50-plus members, including the EU's member states and the EU. They could withdraw from the ECT right now and be part of a global trend: according to UN data, 2019 was the second year where more harmful and outdated investment treaties were cancelled than newly concluded.¹⁹⁵

If several countries withdraw together, they can further limit the sunset clause's effectiveness. Countries that want to leave the ECT could form an agreement among themselves. They could declare that the sunset clause does not affect them before they jointly leave the ECT. Such a declaration would make it difficult for investors from the countries that signed such an agreement to sue other signatory nations. This is not unreasonable. EU member states already reached such an agreement in May 2020 on some 130 bilateral investment treaties they had signed amongst each other.¹⁹⁶ If EU member states took a similar step with regards to the ECT, the majority of the cases under the treaty – currently, 66 per cent of all cases are from EU investors against EU member states¹⁹⁷ – would be moot.

Two groups in the European Parliament have already demanded that the EU withdraw from the ECT.¹⁹⁸ In November 2020, more than 280 Parliamentarians from across the EU and different political parties called on EU member states to “explore pathways to jointly withdraw from the ECT by the end of 2020” if provisions that protect fossil fuels are not deleted in the modernisation negotiations.¹⁹⁹ As these negotiations are likely to fail because of wide disagreements between member states and unlikely to produce any results that will change the ECT's deep-seated problems (see claim 11), countries should indeed consider promptly withdrawing from the ECT. Given the urgency of tackling climate change and accelerating the energy transition, there is no time to lose.

Claim 15



We cannot abandon the ECT because we need to uphold multilateralism!



Reality

Multilateralism needs to serve both people and the planet. The investor privileges set forth in the ECT enshrine a form of multilateralism that only serves the profit motives of corporations. Countries are increasingly abandoning harmful investment treaties like the ECT to pave the road toward progressive internationalism.

The investor-state dispute settlement mechanism, which can be found in the ECT, is **hugely controversial amongst legal scholars, governments, courts**

“Withdrawal from the treaty... would entail a further geopolitical shift from multilateral regimes towards a world order based on unilateralism and protectionism.”

Andrei V. Belyi, former member of the ECT Secretariat²⁰⁰

and other sectors of civil society around the world. It is a parallel justice system for the rich, which grants more favourable treatment to some of the wealthiest actors in society than anyone else. It breaks with key principles of international law (such as the rule to exhaust domestic legal remedies) and threatens to undermine other legal systems and treaties, including the Paris Agreement. A group of UN Special Rapporteurs stated that investor-state dispute settlement is “incompatible with international human rights law and the rule of law.”²⁰¹

It is for these and other reasons that the United Nations Conference on Trade and Development (UNCTAD), one of the field’s leading international organisations with 195 member countries, considers withdrawal from ECT-like agreements a legitimate reform option towards a more sustainable international legal order.²⁰² According to UNCTAD data, 2019 was the second year where more harmful and outdated investment treaties were cancelled than newly concluded.²⁰³

Many states that have terminated treaties are among the most engaged when it comes to reforming international investment law, including in multilateral fora like the United Nations Commission on International Trade Law (UNCITRAL).²⁰⁴ South Africa and Ecuador, which have terminated several outdated investment treaties, have also begun negotiations for an international agreement on businesses and human rights.²⁰⁵ So, far from having turned isolationist, these countries are advocating a **more progressive multilateralism with sustainable development at its heart.**

Similarly, withdrawal from the ECT could open up the political space for international agreements that truly advance the energy transition and alleviate energy poverty. Like Luxembourg’s energy minister, Claude Turmes, has said on the ECT: “This treaty is fundamentally opposed to climate protection. It needs to be reformed very deeply. Or we as Europeans must make a new treaty with others who take climate protection seriously and get out of the ECT.”²⁰⁶

*COUNTERING CLAIMS THAT
JOINING THE ECT WOULD BE
BENEFICIAL FOR COUNTRIES
IN THE GLOBAL SOUTH*



Claim 16

The ECT brings access to modern energy services and reduces energy poverty!



Reality

“The world needs more energy investments. A growing world population and rising living standards means that global demands for energy will increase... This of course is why instruments like the Energy Charter Treaty matter.”

Annette Magnusson, Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce²⁰⁷

“Perhaps the key to unlocking Africa’s investment potential in order to guarantee universal access to energy and to overcome energy poverty is the Energy Charter Treaty.”

Leaflet of the ECT Secretariat²⁰⁸

“The Treaty boosts security of supply for importing countries and security of demand for exporters. It is particularly valuable for countries that are not in the highest stage of development... They all become part of one regulatory framework which can be used for getting energy to the people.”

Urban Rusnák, Secretary General of the Energy Charter²⁰⁹

While there is no evidence that the ECT will bring additional investment, future ECT member states risk costly lawsuits in private arbitration tribunals for decades and severe constraints when it comes to reversing privatisations or regulating energy prices.

Studies found no evidence for the claim that investment treaties like the ECT increases investment in a country (see also claim 1).²¹⁰ So, for countries aiming to increase investment in their energy sector, becoming a member of the ECT is unlikely to produce any benefits. Likewise, there is no evidence that joining the ECT has led to a reduction in energy poverty.

However, the downsides of the ECT are very clear and particularly severe for countries in the Global South:

1. Countries joining the ECT risk a **flood of costly investor attacks**. The ECT is already the most used treaty for investment arbitration in the world and investors from ECT countries are the heaviest users of the system. 60 per cent of all known investor-state cases worldwide are from investors whose home state is a member of the ECT – the vast majority of them European Union countries.²¹¹ At the same time there is not a single known investment case from an investor whose home state is a low-income country.²¹²

2. The ECT actually **restricts the ability of governments to fight energy poverty**. Several Eastern European countries have already been sued under the ECT because they took steps to curb the profits of energy companies and lower electricity prices for consumers.²¹³ This is particularly

dangerous for low-income countries, where even small rises in energy prices can reduce access to energy and harm consumers.

3. The ECT makes it **much more difficult to undo failed privatisations** or expand public sector involvement, as governments often have to do in the energy sector. Many energy privatisations have led to higher prices for consumers, poorer service, underinvestment in infrastructure and workers being fired. But reversing failed energy privatisations can trigger investor-state lawsuits under the ECT, as happened to Albania which ended up paying €100 million to settle one such case.²¹⁴

4. The ECT could significantly **restrict the sovereignty of states** to regulate investments in their energy resources so that they contribute to national development. Under the ECT, large energy companies can sue governments if they decide to tax windfall profits, force companies to hire local workers, transfer technology, process raw materials before export, or even protect natural resources, among other things.

5. As noted in claim 14, once the ECT has been joined, **investor rights apply for at least 26 years**. Countries risk being locked into a treaty that leaves them little space to regulate their energy sector and exposes them to lawsuits by some of the most litigious investors in the world.

Claim 17

Joining the ECT allows countries to have a say on global energy issues!



Reality

The ECT has limited geographical reach and is dominated by Western fossil fuel interests and lawyers with an interest in costly ECT lawsuits against states. It is not an appropriate forum in which to tackle questions of sustainable energy for countries in the Global South.

The Energy Charter attempts to portray itself as a main forum to discuss and resolve questions around energy in the 21st century. But a closer look reveals that it is an inappropriate venue for Global South nations to turn to should they wish to cooperate to resolve their energy challenges:

1. The ECT's membership is mostly limited to Western and Eastern Europe countries as well as some in Central Asia. Many of the most important players in the international energy landscape are absent from

“The Energy Charter Conference (the main governing body for the ECT...) creates a foundation for the development of a meaningful energy co-operation at the regional level.”

James Nyamongo, Kenya Pipeline Company, in article entitled “What Kenya must join the Energy Charter Treaty”²¹⁵

the ECT (and the related International Energy Charter), including the United States, the Gulf countries, Canada, Indonesia, Brazil, and India. **There are other more inclusive and truly global forums**, where conversations about energy occur. For example, the International Renewable Energy Agency has a much wider membership and is focused on supporting the roll out of renewable energies, including the facilitation of investment.

2. The Energy Charter’s **advisory bodies are dominated by multinational fossil fuel corporations and investment lawyers**. Many companies advising the ECT staff have already started investor lawsuits against its member states and the law firms on the Legal Advisory Task Force read like the who’s who of the arbitration industry, i.e. lawyers with a financial interest in costly ECT lawsuits against states.²¹⁶ There are no advisory groups that represent other interests, not least those of the Global South. (see section 3 for more information)

3. Recent reporting has uncovered that the **Secretariat tasked with administering the ECT is malfunctioning**. A leaked report described how a failed organisational restructuring is leading to “serious concerns about both the quality and quantity of the secretariat’s output” and warns that public money that sustains the secretariat is “being wasted and possibly misused.”²¹⁷ Parts of the ECT leadership are also questioning the need to end fossil fuels and have called the energy transition “ideology”.²¹⁸

Claim 18



It is presumptuous for NGOs to tell countries that they shouldn't join the ECT!



Reality

Opposition to investment treaties like the ECT is widespread across the world.

It is wrong to suggest that the criticism of the ECT comes only from a few NGOs. There are **active campaigns against investment treaties on all continents**. In June 2020 more than 600 trade unions, environmental, health and development organisations from 93 countries called on governments to stop signing treaties with extreme investor privileges and to terminate existing ones. Civil society groups from most of the ECT accession candidates were signatories to the letter.²²⁰

The **criticism of the investment protection regime is widely shared beyond civil society**. Hundreds of law and economics professors signed letters highlighting the problems of the system.²²¹ A group of UN Special Rapporteurs stated that investor-state dispute settlement is “incompatible with international human rights law and the rule of law.”²²² Judges and public prosecutors, too, have raised concerns about granting exclusive rights and access to pseudo-courts to foreign investors, calling on legislators to “significantly curb recourse to

“Q: “So why do NGOs call on African governments not to sign on to the ECT?”

A: *“I don’t know. I don’t get it. It is the sovereign right of each country to decide what sort of investments they want to have. If they have a commitment to attract investment in renewable energy, the Treaty will protect those investments. That’s why there is a lot of interest in the Treaty from African countries and countries across the world. [...]”*

Q: “It’s a bit presumptuous perhaps to tell them what they should do?”

A: *“Yes. This is just a very small group of NGOs that keep making the same claims, which are simply baseless and only help them to be on the news.”* ”

Interview with Urban Rusnák, Secretary General of the Energy Charter ²¹⁹

arbitration in the context of the protection of international investors".²²³ And politicians from across the political spectrum have voiced their opposition. In September 2020, for example, more than 280 Parliamentarians from across the EU and diverse political parties called on EU member states to reform or ditch the "obsolete" ECT because it is "a serious threat to Europe's climate neutrality target and more broadly to the implementation of the Paris Agreement".²²⁴

Often the criticism comes from governments themselves. Many countries in the Global South are now wary of investment treaties themselves after becoming the target of hundreds of investor claims. This is reflected in the fact that in 2019 and 2017, more investment treaties were terminated than new ones concluded.²²⁵ Some African countries like Nigeria, Tanzania, Morocco and Uganda that are now considering joining the ECT have either terminated investment agreements or adopted reformed models that depart significantly from the ECT.²²⁶ This reflects a trend on the continent as a whole, as the UN Conference on Trade and Development (UNCTAD) reported: "In Africa, several regional instruments have adopted a cautious attitude towards investor-state dispute settlement and have often omitted it."²²⁷

One explanation for the discrepancy between challenging old investment treaties and joining the ECT could be the limited involvement of economics or finance ministries with more in-depth investment treaty and arbitration experience. As one expert who works closely with governments from the Global South remarked: "It is a common practice for countries to designate their energy ministries as the competent agencies to decide whether or not to join the Energy Charter. Since these ministries are typically not involved in the negotiation of investment treaties, the legal implications of the 1994 Energy Charter Treaty may not always be adequately understood."²²⁸

6 REASONS TO LEAVE OR NEVER JOIN THE ECT

Reason 1: The ECT is the world's most dangerous investment agreement.

Investor-state arbitration under the ECT is not a fair or independent system to resolve disputes between states and investors. Globally, no other treaty has triggered more investor attacks against states than the ECT. So far, 134 cases and counting. In ECT lawsuits, tribunals of three private lawyers can force governments to pay out billions in taxpayer money to compensate corporations, including for entirely hypothetical missed 'future profits'.

Reason 2: The ECT undermines democracy and could put the brakes on climate action.

It is a tool to bully decision-makers and make governments pay when they try to reverse the global climate crisis and protect public interests. This is a particular threat to an urgently-needed transition away from fossil fuels, which requires bold regulations that will inevitably curtail profits for some of the largest oil, gas, and coal corporations. The ECT has already been used to attack bans on fossil fuel projects, environmental restrictions on power plants, and the phaseout of coal.

Reason 3: The ECT limits sovereignty and policy space to regulate in the public interest, including for affordable energy prices.

The ECT can be used to impede any type of regulation on energy investments, including taxes. It can also be used to lock-in failed energy privatisations and erode attempts to regulate electricity prices to make energy affordable for all.

Reason 4: The ECT's investor privileges do not bring the claimed economic benefits.

There is currently no evidence that the agreement helps to reduce energy poverty and facilitate foreign direct investment, let alone investment in renewable energy.

Reason 5: The modernisation of the ECT will not fix its flaws.

The ECT modernisation is an attempt to re-legitimise an outdated, dangerous, and increasingly controversial treaty. Even if governments agree to modernise the ECT, proposals currently on the table will not deliver an ECT 2.0 in line with the Paris Agreement and they will undermine the efforts to achieve a European Green Deal.

Reason 6: The ECT locks-in countries for decades.

Once a country joins the ECT, it is locked in for at least 26 years – even if subsequent governments wish to leave. While any government can withdraw 5 years after ECT accession and its withdrawal takes effect a year later, it can still be sued for 20 more years for investments made before the withdrawal.

KEY RESOURCES

For critical reports, videos and newspaper articles on the ECT, visit:
<https://energy-charter-dirty-secrets.org/resources/>

Official and leaked documents on the ECT modernisation process

- ECT Secretariat documents: <https://www.energychartertreaty.org/modernisation-of-the-treaty/>
- EU modernisation proposal (May 2020): https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf
- Negotiation draft first round of negotiations 6-9 July 2020: <https://www.politico.eu/wp-content/uploads/2020/07/Negotiation-draft-ECT-modernisation.pdf>
- EU proposal on definition of economic activity (October 2020): <https://www.politico.eu/wp-content/uploads/2020/10/Commission-Proposal-Economic-Activity-and-Scope-ECT-October-26-2020-Scanned-Version1.pdf>

Documents regarding the expansion process (CONEXO policy)

- ECT policy on expansion (approved in 2012): <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201203.pdf>
- ECT Secretariat overview: <https://www.energycharter.org/what-we-do/conexo/overview/>
- Who is funding the expansion process? According to an information request from 2018 (<https://www.asktheeu.org/en/request/4272/response/13805/attach/7/main%20doc.pdf>), the EU funded ECT outreach activities through “technical assistance” development funds. A follow up request was denied (https://www.asktheeu.org/en/request/meeting_reports_correspondence_w).
- List of EU embassies that facilitate expansion activities: <https://www.energycharter.org/what-we-do/conexo/energy-charter-liaison-embassies/>

Ideas for basic research in case your country is already a member of the ECT

1- Your country and the ECT: When did your country join? Who were the key actors involved? Why was your government interested in joining? [Here is a good place to start: <https://www.energycharter.org/who-we-are/members-observers/>]

2- Impact of the ECT on your country: How many times has your country faced ECT-related lawsuits? How much has your country been sued for? How many cases has your country lost? Who were the investors suing and why? How many times have investors from your country sued other governments using the ECT? [You can search the ECT database of cases here: <https://www.energychartertreaty.org/cases/list-of-cases/> and review the database at the bottom of this page: <https://energy-charter-dirty-secrets.org>]

3- Your country and the energy sector: What does the energy sector look like in your country? What are the main existing, planned and most controversial energy investments from current members of the ECT? Do the main energy sector investors come from countries that are part of the ECT?

Ideas for basic research in case your country is in the process of acceding to ECT

1- Your country and the ECT accession process: What stage of the process is your country at? [check the table here <https://energy-charter-dirty-secrets.org/#section3>] Who are the key actors? What are your government's key interests? What are the key interests of other states?

2- Your country and the energy sector: What does the energy sector look like in your country? What are the main existing, planned, and most controversial energy investments from current members of the ECT?

3- What are the main risks for your country if it joins the ECT? [Check your country's current experience with investment arbitration cases in general at: <https://investmentpolicy.unctad.org/investment-dispute-settlement>]

4- Your country and current protection of energy investors: What are the investment treaties currently in force in your country? Will signing the ECT make a difference in terms of expanding the coverage of investment protection? [Check which investment treaties are already in force in your country here: <https://investmentpolicy.unctad.org/international-investment-agreements>]

End notes

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