

SILENT EXPANSION

Will the world's most dangerous investment treaty take the global south hostage?



Two decades ago, and without significant public debate, an obscure international investment agreement entered into force. The Energy Charter Treaty (ECT) gives foreign investors in the energy sector sweeping powers to sue states over government actions that have supposedly ‘damaged’ their investments. Investors use a parallel court system to sue, and the compensation for a win can be in the billions. In recent years, the ECT has become increasingly controversial – because of its potential to obstruct the transition from climate-wrecking fossil fuels towards renewable energy, to lock-in failed energy privatisations, and undermine affordable energy prices. But despite the growing controversy many countries, particularly in the global south, are in the process of joining the ECT. Lured by the false promise that it will help attract investors and solve energy poverty, there is often little consideration by these governments of the ECT’s severe political, legal, and financial risks to new signatory states. This is despite the fact that, if a country accedes to the ECT, it is locked into it for 26 years – even if subsequent governments want to leave.

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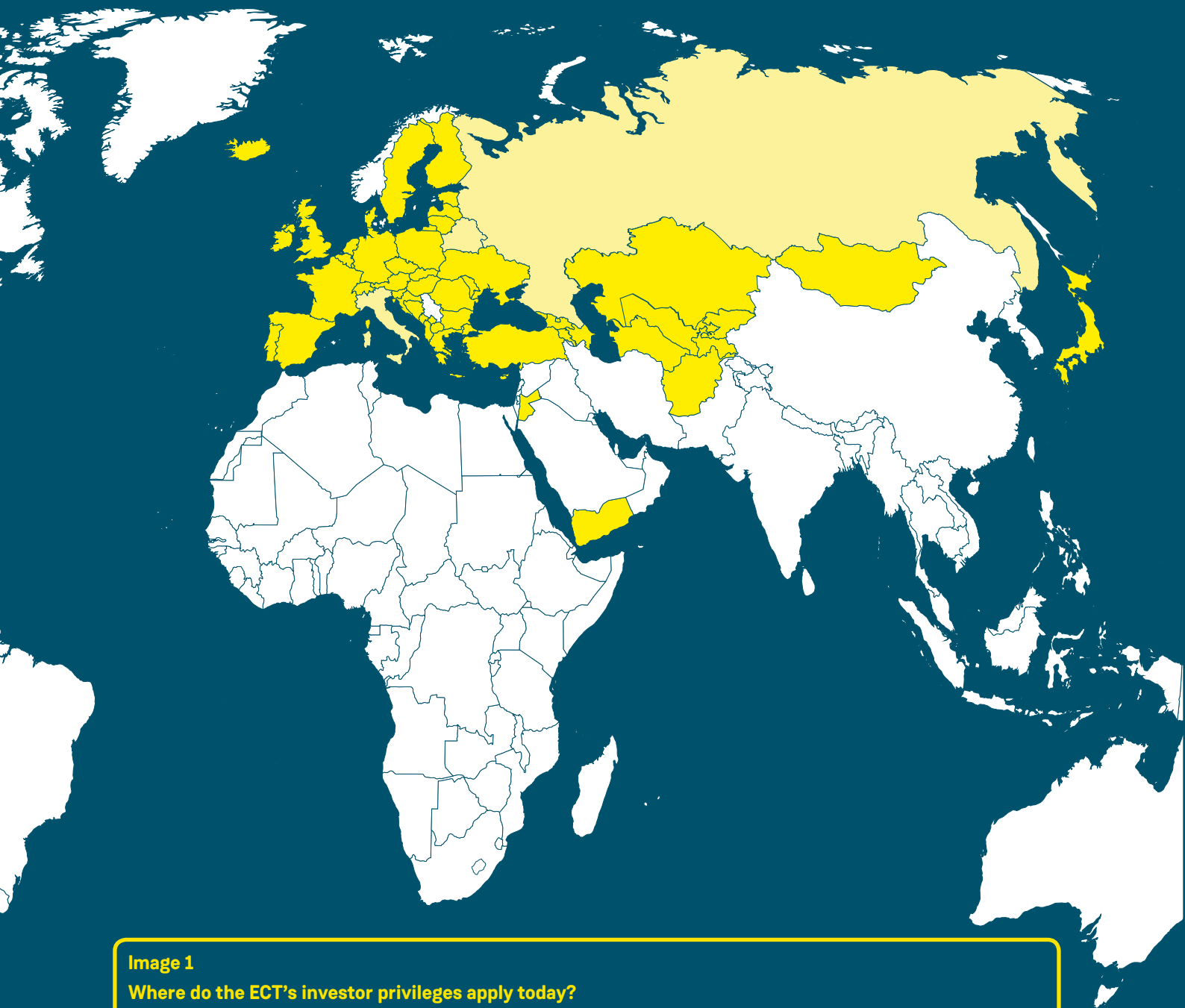


Image 1

Where do the ECT's investor privileges apply today?

Countries where the ECT applies in full: Afghanistan, Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Mongolia, Montenegro, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, and Yemen.

Countries in special situations: Belarus (which has not ratified the ECT, but applies it provisionally), Italy (which left the ECT in 2016, but can still be sued under certain conditions), and Russia (which never ratified the ECT and withdrew its provisional application in 2009, but has still been sued many times).

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Unpacking the Energy Charter Treaty (ECT)

The ECT is a 1994 international agreement for the energy sector, the investment rules of which currently apply to 53 countries from Western and Eastern Europe, Central, Western and Northern Asia, and Japan, Jordan and Yemen,¹ as well as the European Union (EU) and the European Atomic Energy Community (EURATOM) (see Image 1 on page 2).

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 peculiar privilege to directly sue states outside of existing courts, in international tribunals consisting of three private lawyers, the arbitrators. In these tribunals, companies can claim dizzying sums in compensation for government actions that they argue have damaged their investments (see Box 1 on page 6).

Due to its wide geographical reach and its extremely broad and generous investor privileges (which were drafted in the 1990s when their risks were not yet well known) the ECT is a particularly dangerous investment agreement.

The ECT's investor-state dispute settlement system – also known as ISDS – can be used to challenge any action by a nation state that could affect an investment: from laws and regulations from parliaments; to measures by governments and their agencies; and even court decisions, no matter whether they are taken at the local, regional, or national level. 'Investment' is interpreted so broadly that even mere shareholders can sue, while corporations can claim not just for the money invested, but for loss of future anticipated earnings as well. Sometimes the act of filing of a costly dispute – or a mere threat to do so – can be enough to freeze government action, when policy-makers realise they would have to pay to regulate.

The Energy Charter Treaty offers unparalleled opportunities for investors in the energy sector to protect their foreign investments and enforce those protections through international arbitration.

Lawyers from investment arbitration law firm Skadden Arps Slate Meagher & Flom²

[The] ECT privileges... interests of foreign investors over the societal and economic interests of the host state and national stakeholders who have no rights under the system.

Yamina Saheb, energy expert and former employee at the ECT Secretariat³

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 the environmental impacts that the plant will have on the Elbe river and its wildlife.⁴ In 2012 Vattenfall sued again, seeking €6.1 billion (including interest)⁵ for lost profits related to two of its nuclear reactors. This ongoing case challenges the decision to speed up Germany’s phase-out of atomic energy. By the end of 2019 it had led to €18.6 million in legal defence costs for German taxpayers.⁶

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.⁷ Rockhopper is demanding up to US\$350 million, seven times the money that it actually spent on developing the project.⁸ 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 from it.⁹

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 2040.¹⁰ The lawsuit threat potentially contributed to watering down the law, the final version of which allows exploitation permits to be renewed after that deadline.¹¹ German energy company Uniper, too, is using the threat of an ECT lawsuit to oppose the transition away from dirty energy. In September 2019, Uniper threatened to sue the Netherlands over a law to ban the use of coal for electricity production by 2030.¹² The company might claim up to €1 billion in compensation.¹³

Going global: expanding the ECT into Africa, Asia, and Latin America

Since 2012 the ECT’s Secretariat – which is not just an administrative body, but the driving force behind drumming up support and new signatories for the treaty – has been putting great effort into expanding the geographical reach of the agreement to countries in Africa and the Middle East, Asia, and Latin America. The Secretariat has downplayed the risks of the ECT and exaggerated its benefits (see the sections on ECT accession risks and empty promises below). As a result, many countries are in line to sign the agreement, with its extreme investor privileges. In signing up, they risk shrinking their ability to decide their own energy policy, as well as opening themselves up to the potential for costly lawsuits by investors.

In a relentless promotion tour the staff at the ECT Secretariat advertises the agreement at conferences and gala dinners around the world, meeting heads of states, ministers, ambassadors, and other officials and conducting trainings for them.²⁴ The Secretariat also hosts seconded experts from potential accession countries at its Brussels office, where the Secretariat helps them prepare the reports required for their accession.²⁵ The Secretariat’s vision is that by 2021, ECT “membership would spread on all continents and would become quasi-universal”.²⁶

The Energy Charter Secretariat is in expansion mode, wanting to gain access to energy resources in Africa and Asia for its current – mostly developed – country members.

Nathalie Bernasconi-Osterwalder,
International Institute for Sustainable
Development (IISD)²³

Box 2. The ECT in figures

- No trade and investment agreement anywhere in the world has triggered more investor-state lawsuits than the ECT. In March 2020 the ECT Secretariat listed a total of **129** corporate claims.¹⁴ As proceedings can be kept secret, the actual number is likely to be 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.¹⁵ This trend is likely to continue.
- ECT cases such as Vattenfall's **€6.1 billion** challenge to Germany over its exit from nuclear power are among the most expensive claims in the history of investor-state arbitration.
- Under the ECT governments have been ordered or have agreed to pay more than **US\$52 billion** in damages from the public purse¹⁶ – more than the annual investment needed to provide access to energy for all those people in the world who currently lack it.¹⁷
- Outstanding ECT claims where this information is available (only 36 out of 61 cases) have a collective value of **US\$32 billion**¹⁸ – far more than 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 ISDS disputes,²⁰ but can be much higher. In the cases over the dismantling of the now-defunct former oil giant Yukos, they reached the huge sum of **US\$124 million**, of which Russia was ordered to pay nearly **US\$103 million**.²¹
- **97 per cent** of investors who sued via the ECT by the end of 2012 were fossil fuel companies or otherwise involved in dirty energy projects.²²

The slippery slope of ECT accession

In order to pull more countries into the orbit of the ECT, the Secretariat uses a political declaration known as the International Energy Charter, which it gets states to sign up to. This charter has neither legally binding force nor financial implications, but maps out general principles for global cooperation in the energy field. It was originally signed by more than 70 countries in 2015; by 2019, its signatories had grown to 91 countries and regional groupings from all continents.²⁷

Although it has no binding conditions, signing the International Energy Charter is considered “a first step towards accession to the legally binding Energy Charter Treaty”.²⁸ Several countries have indeed been pulled into the ECT accession process via the “slippery slope”²⁹ of the international declaration (see Image 2 on pages 8-9). Some seem to be on an ultra-fast track: shortly after The Gambia signed the international charter in 2017, for example, it was already preparing its ECT accession reports. Many more countries have been approached by the Secretariat (for example, South Africa, Botswana, South Sudan, Lebanon, and Oman,³⁰ as well as Algeria, Egypt, Tunisia, Bhutan, Ecuador, Zambia,³¹ and the Philippines³²). Africa seems to be the top target of this recruitment effort, followed by the Middle East, Asia, and Latin America.

Image 2. The many countries and country groupings on their way to acceding to the ECT³³

By signing this legally non-binding political declaration states and regional economic integration organisations become observers. They can then attend meetings of the Energy Charter Conference, the ECT’s highest decision-making body (without voting rights).

Step 1

Signing the 2015 International Energy Charter

- South Korea
- Vietnam
- Chile
- Iran
- Iraq
- Palestine
- United Arab Emirates
- Burkina Faso
- Guyana
- Kenya
- Mali
- Rwanda
- Sierra Leone
- Tanzania
- G5 Sahel
- East African Community (EAC)
- Economic Community of Central African States (ECCAS)
- Economic Community of West African States (ECOWAS)³⁴

A country informs the ECT Secretariat that it wants to accede to the ECT.

Step 2

Expression of interest

The reports show that a candidate country’s laws and regulations are in line with the ECT. The reports are written with support of the Secretariat (who hosts seconded officials in its Brussels office) and are then approved by the government, sometimes following stakeholder consultations.

Step 3

Preparation of accession reports

- Working on reports**
- Benin
 - Cambodia
 - Colombia
 - The Gambia
 - Guatemala
 - Nigeria
 - Panama
 - Senegal

- Approving reports internally**
- Bangladesh
 - Chad
 - China
 - Morocco
 - Niger
 - Serbia

Box 3. Don’t be fooled, ECT expansion has not been halted

The December 2019 Energy Charter Conference – the ECT’s highest decision-making body – was supposed to invite Uganda as the next country to accede to the ECT. But amidst quarrels over the mis-functioning of the ECT Secretariat³⁹ and the Africa focus of the expansion – which, according to insiders, does not satisfy members who prefer a focus on Asia – Uganda’s invite was “put on hold”.⁴⁰ According to a German Government statement from February 2020, ECT “accession for further contracting states is currently suspended”.⁴¹

So has the geographical expansion of the ECT been stopped? Not really. What has been put on hold is the formal invitation of countries which have completed their accession reports (step 5 in the accession process, see image 2 on page 9), until the expansion process has been assessed. In 2020, ECT members might agree to extend this pause until negotiations

to modernise the ECT are concluded (see “empty promise 3” section below).⁴²

But other than that, the expansion push seems to be going ahead at full steam, particularly with regards to the countries far advanced in the process: Pakistan, Burundi, Eswatini (formerly Swaziland), and Mauritania (which are all ratifying the ECT, a process which the Secretariat wants to support in 2020), Uganda (which would be the next invitee), as well as Bangladesh, Chad, China, Gambia, Morocco, Niger, Nigeria, Panama, Senegal, and Serbia (which the Secretariat wants to support in completing and approving their accession reports). And the expansion drive does not end there. In its 2020 work programme, the Secretariat also envisions outreach activities towards Kenya, Iran, and the Economic Community of West African States (ECOWAS), and is keen to target even more countries, “particularly from the ASEAN region”.⁴³

Step 4

Waiting for the invitation to accede

Uganda

Step 5

Invitation to accede to the ECT

Pakistan
(already in 2006)

Step 6

National ratification

Burundi
Eswatini
(former Swaziland)
Mauritania

Step 7

Submission of relevant documents to the ECT depository



The country can now be sued under the ECT.

The Energy Charter Conference unanimously approves the accession reports and invites the candidate country to accede to the ECT.

The candidate country ratifies the ECT according to its internal rules. According to the ECT's former chief lawyer "that's the step that often takes the longest because most would-be ECT member states... only then start to think about the risks and costs" of the treaty.³⁵

Ninety days later the treaty enters into force for the respective country.

Targeting energy ministries

The ECT Secretariat seems to target primarily the energy ministries of its potential new member states. On the other hand, officials with experience in negotiating investment treaties and defending investor-state arbitrations (ie those with long experience of the risks these kinds of treaties present), appear largely absent from the accession process. Nathalie Bernasconi-Osterwalder from the International Institute for Sustainable Development (IISD) explains why this can be a problem: "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."³⁶

This might explain the alarming lack of awareness about the ECT's political and financial risks in some accession countries. While many have had disastrous experiences with corporate lawsuits under other investment agreements and contracts,³⁷ reports written by national experts who have temporarily been seconded to the Brussels-based ECT Secretariat, for example, are full of unproven claims about how the ECT "can positively impact" a country or region "with regard to attracting the needed energy investments"³⁸ – but say nothing of the risks of the ECT's vast investor privileges.

And yet, the risks of joining the ECT are substantial.

The Energy Charter Treaty is by far the most frequently invoked international investment agreement.

United Nations Conference on Trade and Development (UNCTAD)⁴⁵



An avalanche of expensive lawsuits – for decades

Today no other trade and investment agreement has triggered more investor-state lawsuits than the ECT. By March 2020 a total of 129 ECT investor lawsuits were listed on the website of the ECT Secretariat.⁴⁴ Both the number of cases and the amount of money at stake for public budgets and taxpayers is on the rise (see Box 2 on page 7).

Many countries on the ECT accession road have few if any effective investment treaties. Eswatini (formerly Swaziland) and Niger, for example, are party to only two active bilateral investment treaties, while Chad is a party to three agreements, The Gambia to five, and Uganda to six.⁴⁶ Yet these countries are a long way into the ECT accession process (see Image 2 on pages 8-9), which would significantly increase their risk of being sued by foreign investors if they regulate their energy sectors. This is particularly relevant as there are controversial energy projects in many accession countries. The ECT could impede regulations to minimise the social and environmental costs of these projects while maximising their benefits to the local community (see Box 4 on page 11).

Once a country joins the treaty it is vulnerable to ECT lawsuits for at least 26 years – even if subsequent governments want to leave. While any state can withdraw five years after ECT accession and withdrawal takes effect a year later, it can then still be sued for 20 more years for investments made before the withdrawal.⁴⁷ This has happened to Italy: all but one of the 11 known ECT cases against the country were filed after it had announced they were leaving the treaty.⁴⁸ This is an extreme provision that gives undue power to investors: indeed, only around 15 per cent of all the world’s investment agreements include this type of post-withdrawal investment protection for 20 years.⁴⁹

There are several problems with the treaty as it stands.

Carlo Pettinato, Head of Investment Policy at the European Commission’s trade unit⁶³



Undoing reform with an old treaty that bites

The United Nations Conference on Trade and Development (UNCTAD) has warned about ECT-like “old generation” investment treaties, which “are not ‘harmless’ political declarations, but do ‘bite’”. Their “broad and vague formulations... have enabled investors to challenge core domestic policy decisions – for instance, in environmental, financial, energy and health policies”, which is why they should be reformed, replaced, or even terminated or withdrawn from. UNCTAD points out the ECT is a treaty with distinctly serious consequences as it “has been used more frequently than any other international investment agreement to bring investor-state dispute settlement cases”.⁶¹ The EU, too, has recently stated that while the ECT “is the most litigated investment agreement in the world”, its “outdated provisions are no longer sustainable or adequate for the current challenges”.⁶²

Remarkably, several countries which are terminating or reforming their existing investment treaties over concerns about being able to maintain their policy space, still seem ready to undermine these reforms by signing up to the ECT's outdated and extreme investor rights from the 1990s. Tanzania (a signatory to the International Energy Charter) and Uganda (which has already approved its ECT accession reports internally), for example, have both started terminating old investment treaties such as with the Netherlands that had been criticised as "biased".⁶⁴ Two other examples are Nigeria (working on its accession reports) and Morocco (validating its accession reports internally). In 2016 both countries signed an investment treaty with each other which differs significantly from the ECT. For example,

Box 4. A bulwark for polluters and human rights violations?

Examples of harmful energy projects in ECT accession countries

There are several controversial energy projects in ECT accession countries. Should governments respond to community resistance by strictly regulating or even halting them, they could face expensive ECT-lawsuits by foreign investors behind the projects.

"This pipeline can only... increase [the] extraction and consumption of fossil resources".⁵⁰ The proposed Trans-African gas pipeline would span an enormous 5,000km to take Nigerian fossil gas along the West African coast up to Morocco and eventually Europe. Existing gas projects in the region have been criticised for displacing communities, environmental pollution, severe health impacts, the loss of livelihoods, and for fuelling violent resource conflicts.⁵¹ The proposed new pipeline has been rejected by environmentalists and other civil society groups as "bad for the region, our peoples and the Planet".⁵² Five countries on the pipeline route are quite far into the ECT accession (Mauritania, Morocco, Gambia, Nigeria, and Senegal). All others (Benin, Togo, Ghana, Côte d'Ivoire, Liberia, Sierra Leone, Guinea, and Guinea-Bissau) have taken the first step by signing the International Energy Charter (some only as members of the Economic Community of West African States, ECOWAS). The ECT would significantly boost the power of foreign investors in all countries on the route and make it harder for any of the relevant governments to cancel the project.

"The... black snake... is displacing us from our ancestral land".⁵³ In Pakistan's Thar desert Chinese and Pakistani investors are digging up dirty lignite coal to fuel new power plants. The local community is fighting to prevent the acquisition of its ancestral land, fearing that the mines will pollute the air, deplete groundwater in the drought-ravaged region, and destroy livelihoods.⁵⁴ The plants will spew billions of tonnes of carbon dioxide into the atmosphere, exacerbating climate change. If Pakistan and China join the ECT Chinese investors could claim billions if a future Pakistani government decided to fulfil its climate commitments and keep coal in the ground.⁵⁵ The country's Supreme Court is already considering a complaint which argues that the mines deprive future generations of the right to a healthy life.⁵⁶

"Four people were killed and at least 470 injured."⁵⁷ Uganda's Bujagali dam has come under fire for its poor human and labour rights track record, for contributing to a dramatic drop of Lake Victoria's water levels (the lake supports extensive biodiversity and livelihoods for millions of people in Kenya, Uganda, and Tanzania) and the expensive energy it generates, unaffordable to many Ugandans.⁵⁸ The dam could become even more costly for them if its foreign financiers sued Uganda in a private arbitration tribunal, for example, over withdrawn corporate tax exemptions or orders to pay outstanding wages and compensation to workers who were injured during the construction.⁵⁹ Uganda has already approved its ECT accession reports and has just six bilateral investment treaties in force.⁶⁰

Box 5. Examples of how the ECT contradicts today's investment protection reform agenda

Problematic issue	Examples of recent reforms⁶⁶	ECT
ISDS: Foreign investors can sue states in international arbitration tribunals – without exhausting local remedies, so bypassing domestic legal systems.	Exclusion of ISDS (as in Brazil's recent investment treaties); requirement to pursue local remedies, at least initially (as with India's recent treaties and the Morocco-Nigeria investment treaty).	Pretty much unlimited access to ISDS (ECT article 26 (3)). For over half of the signatories, the ECT even allows parallel suits in domestic courts and private arbitration (Annex ID lists just 24 countries which do not automatically accept arbitration when the dispute has already been taken to domestic courts).
Broad – and often open-ended – definitions of 'investments' and 'investors' are protected under treaties, which can allow firms that have made no real investments – including mere mailbox companies – to file claims.	More limited definitions of what 'investment' entails, eg excluding speculative portfolio investment (as in the recent Morocco-Nigeria investment treaty) or excluding mailbox companies from claims (as in the EU's recent treaties, and the new Dutch model investment treaty).	Extraordinarily broad definitions of 'investments' and 'investors', which expose states to unpredictable risk and allow ECT-lawsuits to be filed by all kinds of dubious shell companies (ECT articles 1(6) and (7)).
Guarantee to give an investor "fair and equitable treatment", a catch-all clause that has been used most often and successfully by investors when attacking public interest measures.	Exclusion of the controversial "fair and equitable treatment" clause (for example, in the Pan-African Investment Code). ⁶⁷	Broad "fair and equitable treatment" clause (article 10(1)), which some arbitrators have interpreted in a way that de facto requires countries to pay compensation when they change the law. ⁶⁸
No investor obligations.	Investor obligations relating to human rights, corporate social responsibility, use of natural resources, and land-grabbing (for example, as seen in the Morocco-Nigeria treaty and the Pan-African Investment Code). ⁶⁹	No investor obligations.

it has a more limited definition of investments protected under the treaty (excluding speculative portfolio investment), and it imposes obligations on investors and requires them to take a dispute to a country's domestic courts first (instead of going straight to private international arbitration).⁶⁵ They do not appear to be extending this caution over extremely broad rights for foreign investors, however, to their ECT accession.

So, while many countries are seeing the dangers inherent in an over-empowered investors' rights regime and rolling back commitments from past investment treaties, the dangers of the ECT do not yet appear to be on their radar. As a result, we may yet see more countries – perhaps unwittingly – signing up to an outdated treaty with significant political, financial, and legal risks.



Driving the climate crisis by locking-in fossil fuels

Climate scientists agree that three quarters of the world's remaining fossil fuels need to stay in the ground if we do not want to cause dangerous, runaway global heating.⁷⁰ If we dig up more coal, oil, and gas and burn them we stand no chance of implementing the Paris Agreement and staying below a global temperature increase of 2°C, let alone 1.5°C, the red line which science and governments have drawn.

But governments which halt dirty power plants or drilling rigs could be held liable for millions if not billions of damages under the ECT. The treaty could also be used to put significant pressure on governments to allow new projects which would accelerate climate change and further lock-in fossil fuel dependence. This danger is illustrated by several existing cases, such as Rockhopper's ongoing legal challenge to Italy's ban on new off-shore oil drilling projects, as well as ECT litigation threats against laws to put an end to fossil fuel extraction (in France), and to ban the use of coal for electricity production (in the Netherlands) (see Box 1 on page 6).

It is without doubt that strong climate action is likely to be challenged by affected investors under the ECT.

Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, International Institute for Sustainable Development (IISD)⁷¹



Locking-in the failures of energy privatisations

In many parts of the world communities and governments are reversing failed privatisations and taking energy distribution systems back into public hands. Between 2000 and 2017, at least 189 energy services were reclaimed and another 122 were newly created after previous privatisations had failed to live up to their promises.⁷³ Often such energy privatisations have led to higher prices for consumers, poorer service, underinvestment in infrastructure, workers being fired, harsher conditions on the job – and the list goes on.

Compensation orders are retrospective and uncapped and ISDS litigation costs are high. As a result, countries face unique incentives to avoid climate change action in order to limit their potential liability in ISDS.

Professor Gus van Harten, Osgoode Hall Law School⁷²

But reversing failed energy privatisations can trigger investor-state lawsuits with potential damages claims running into millions. This happened, for example, to Albania after it revoked the electricity distribution license of Czech energy giant ČEZ. The company filed a €190 million ECT claim in response in 2013.⁷⁴ The revocation came after ČEZ had cut off power to the water and sanitation utilities of several Albanian towns, accumulated considerable outstanding debts to the government and failed to meet other contractual obligations, for example, by failing to invest in the power grid.⁷⁵ Albanians had also complained about high prices, poor service or even an absence of it, as well as power shut-downs. Albania settled the case in 2014 and agreed to pay €100 million in damages, seemingly under significant pressure from the Czech Republic (the majority owner of ČEZ), which had threatened to use its veto-right to block Albania’s EU accession candidate status.⁷⁶

When in 2019 the opposition British Labour Party planned to take the energy industry back under public control, arbitration lawyers predicted a “flood of claims” under the ECT and other investment deals.⁷⁷ Due to their vast rights for foreign investors, claims under such treaties would “have a stronger chance of succeeding” than claims under the UK’s Human Rights Act – and investors “could end up receiving higher compensation”, law firm Clifford Chance argued.⁷⁸



Undermining efforts to make electricity affordable for all

Energy poverty is a reality across the globe. It is estimated that 600 million people still don’t have access to electricity in Africa.⁷⁹ A key to address this problem is the ability of governments to regulate electricity prices, and impose a cap when needed.⁸⁰

But the ECT could be used to undermine government action to reduce energy poverty. Several Eastern European countries have already been sued under the ECT because they took steps to curb big energy’s profits and lower electricity prices for consumers.⁸¹ One of the first such cases was filed by a British subsidiary of US-based energy behemoth AES, a Fortune 200 company, against Hungary in 2007. AES wanted US\$230 million in compensation because the Hungarian Parliament had introduced a regime to regulate the prices that were paid to electricity companies in an attempt to curb their excessive profits. While the arbitrators ruled against AES in 2010, Hungary had to pay the bills of its own lawyers and half of the tribunal’s costs, US\$5.9 million in total.⁸²

In the UK investment lawyers predicted “more regulatory disputes”⁸⁴ under the ECT when the former Conservative government under Theresa May announced a cap on energy prices for consumers to end the “rip-off” bills of the country’s largest utilities.⁸⁵

International investment standards, in particular the fair and equitable treatment standard, could shield foreign investors in electricity production from the introduction of price caps or the re-regulation of liberalized electricity prices.

Professor Anatole Boute, Chinese University of Hong Kong⁸³



Restricting sovereignty over energy resources

Many countries and regions on the ECT accession road are significant fossil-fuel producers and/or on the verge of multiplying production: China is the world's biggest producer of coal as well as the world's fifth and sixth biggest producer of oil and fossil gas; Nigeria is Africa's largest producer of oil and gas and plans to almost double its oil production by 2025; both Bangladesh and Pakistan are building new coal power plants expected to triple their coal power generation capacity; the East African Community is actively advertising fossil fuel investments, aiming to fully "develop Partner States' petroleum potential".⁸⁶ The ECT would significantly boost the power of foreign energy investors in these and other accession countries, not only risking locking in fossil fuel dependency and further driving the climate crisis, but also restricting countries' policy-space.

Governments that want to attract foreign investment in the energy sector should aim to safeguard the policy-space to regulate those investments so that they contribute to national development. But under the ECT large energy companies can sue governments if they, for example, decide to apply taxes on windfall profits,⁸⁷ force companies to hire local workers, transfer technology, or process raw materials before they are exported. By signing on to the ECT, states sign away a lot of policy space and sovereignty to regulate in the public interest.

If the risks of acceding to the ECT are so serious, why are countries even considering signing on to it? The reasons are often complex, but there are a number of promises which ECT proponents make when they advertise the agreement that might appear convincing. While the very real risks are downplayed, the benefits are pushed hard, including lures such as the hope of attracting more foreign investors, and modernisation of the energy sector. However, the claimed benefits of the treaty do not bear up against the weight of evidence and appear to be more sales pitch than reality.

The ECT imposes an obligation on States not to change their regulatory frameworks such that it materially affects the economics of long-term energy investments.

Lawyers of specialised investment arbitration law firm Allen & Overy⁸⁸



The ECT will not solve energy poverty

Many countries hope that by joining the ECT they will attract investment to end energy poverty among their people who often lack access to electricity for basic needs like cooking. This hope is nurtured by the Secretariat and other ECT advocates who repeatedly assert "the Treaty's potential... to attract foreign investments to the energy sector"⁸⁹ to "eradicate energy poverty".⁹⁰ A PR text on Africa and the ECT suggests: "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."⁹¹

There is still a lack of evidence that the ECT has a positive impact on flows of investment in any sector, including the renewable energy sector.

Kyla Tienhaara and Christian Downie,
Australian National University⁹³

The ECT's investment rules, however, do not live up to these promises: as with other similar agreements, there is no hard evidence that it actually encourages investment. While some econometric studies find that investment treaties attract some investors, others find no effect at all – or even a negative one. Qualitative research suggests that for the vast majority of investors, investment treaties are not a decisive factor when they go abroad.⁹²

This has also been the experience of governments in different parts of the world: Brazil, for example, receives the largest amount of foreign investment in Latin America,⁹⁴ despite having never ratified a treaty that includes investment arbitration. In Indonesia foreign investment from the Netherlands actually increased after the country terminated its investment treaties with the Netherlands and other countries.⁹⁵ And when South Africa cancelled some of its investment treaties, an official noted that the agreements “have not been decisive in attracting investment”.⁹⁶



The ECT will not advance the energy transition

Proponents of the ECT – and ISDS more broadly – sometimes claim that they are effective tools to combat climate change. They argue that by reducing investment risks, the ECT helps to attract capital into clean energy and that its ISDS enforcement mechanism is a way to put strong pressure on states to keep their climate promises, as in cases in which investors have sued countries for cutting support to renewable energy projects.⁹⁷

However, there is no evidence that the ECT actually has a positive impact on flows of investment in any sector, including into clean energy (see “empty promise 1” section). The agreement neither discourages climate-wrecking oil, gas, and coal investments, nor does it encourage a transition to genuine renewable energy from wind, wave, and solar. In addition, the ECT neither protects investments in energy efficiency nor other measures to reduce energy demand.⁹⁸

More importantly the ECT might not just fail to facilitate a transition away from fossil fuels and towards renewables, but could actively impede it (see “ECT accession risk 3” section). According to a former employee at the ECT Secretariat, “investments in fossil fuels represented at least 61% of total investments protected by the ECT”,¹⁰⁰ making ECT challenges against decisions to keep coal, gas, and oil in the ground rather likely.



ECT modernisation will not fix the problems

In 2017 ECT member states began assessing “the potential need and/or usefulness of updating, clarifying or modernising” the agreement’s investor rights¹⁰¹ and in November 2018 approved a list of topics for

The... ECT... favours fossil fuels and excludes many sustainable energy resources.

Sarah Keay-Bright, former senior employee at the ECT Secretariat⁹⁹

discussion.¹⁰² ECT proponents like the European Commission argue that this will make the agreement climate-friendly and costly lawsuits against legitimate regulation less likely.¹⁰³

The modernisation agenda, however, does not live up to these promises. Two of the most obvious, and – from a perspective of tackling the climate crisis and meeting the sustainable development goals – effective, reform options are missing from the list of topics that will be discussed: the exclusion of carbon-intensive energy investments from the scope of the ECT, and the exclusion of ISDS. Both would prevent polluters from challenging climate change mitigation actions of states outside of their legal systems, limiting the risk of a chilling effect on climate action.

Even more minor reforms such as making ECT disputes more transparent seem to be controversial amongst ECT members,¹⁰⁴ which include a significant number of fossil fuel exporting countries and some staunch supporters of today’s private arbitration regime. In addition, every treaty amendment would require a unanimity vote by the ECT parties and parties such as Japan have already stated that they see no need for any amendments.¹⁰⁵

This is why an internal European Commission report from 2017 considered it “not realistic” that the ECT will really be amended¹⁰⁷ and why more and more experts and a large number of civil society organisations argue for a withdrawal from the treaty entirely (see Box 6). As energy expert Yamina Saheb, a former employee at the ECT Secretariat, put it in a scathing report on the ECT modernisation in February 2020: “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... Withdrawing from the ECT is, therefore, the only option left.”¹⁰⁸

It is unlikely that Contracting Parties would reach an agreement to align the Treaty with the Paris Climate Agreement.

Masami Nakata, former assistant to the ECT Secretary General, on the ECT modernisation¹⁰⁶

How many ECT cases does the EU need to acknowledge that the only way forward is to withdraw from the Treaty?

Insider at the Energy Charter Secretariat wishing to remain anonymous¹¹⁵

Box 6. An increasingly contested agreement

While the ECT and its profiteers have escaped public attention until recently, there is growing awareness about its problems. Recent developments have helped to highlight concerns about the agreement:

- In the wake of its first ECT-lawsuits, Italy withdrew from the agreement in December 2014. The withdrawal took effect on 1 January 2016.¹⁰⁹
- The European Commission and many EU members have argued that ECT claims by EU-based investors against EU states are incompatible with EU law. The European Court of Justice, through its 2018 Achmea ruling, has also put into question the legality of such intra-EU proceedings and it is likely that the ECT will come under increasing fire from EU courts.¹¹⁰
- The European Commission’s negotiation mandate for modernising the ECT from July 2019 calls the treaty “outdated” and “no longer sustainable or adequate for the current challenges”.¹¹¹
- In September 2019 Luxembourg’s Energy Minister Claude Turmes called for a coalition of willing EU member states to push for substantial ECT reform – and to seriously consider withdrawing from it if the reform process advances too slowly or lacks ambition.¹¹²
- A growing number of experts¹¹³ as well as trade unions, environmental, and trade-related civil society groups is calling on ECT members to withdraw from the agreement because it is “an outdated Treaty that risks undermining necessary climate measures.”¹¹⁴

Conclusion: Six reasons for never joining the ECT

After more than 20 years of the ECT in action it is clear that the risks of its foreign investor rights outweigh any potential gains that states might have expected from signing the agreement. In summary, here are six key reasons for never joining – or for leaving – the ECT:

Reason 1

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

Globally, no other treaty has triggered more investor attacks against states than the ECT. In ECT lawsuits, tribunals of three private lawyers can force governments to pay out billions in taxpayers' money to compensate corporations, including for entirely hypothetical missed 'future profits'. The value of just over half of the lawsuits pending in December 2019 (the only lawsuits for which this information is available) was US\$32 billion. That sum exceeds the GDP of many countries and is more than the estimated annual amount needed for Africa to adapt to climate change.

Reason 2

The ECT undermines democracy and could put a brake on climate action.

It is a tool to bully decision-makers and make governments pay when they act to fight the climate crisis and protect other public interests. This is a particularly worrying threat to the urgently-needed transition away from fossil fuels, which requires bold regulations and will curtail the profits of some of the largest oil, gas, and coal corporations. The ECT has already been used to attack bans on polluting fossil fuel projects, environmental restrictions on dirty power plants, and the coal phase-out.

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 against 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 investment, let alone investment into renewable energy.

Reason 5

The ECT locks-in countries for decades.

Once a country joins the ECT, it is locked into it for at least 26 years – even if subsequent governments want 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.

Reason 6

ECT modernisation is an attempt to re-legitimise an outdated, dangerous, and increasingly controversial agreement.

It is highly unlikely that the ongoing ECT modernisation process will bring the ECT in line with the goals of the Paris Agreement on climate change, nor reduce the risk of ruinous corporate lawsuits against states.

Given that the political, financial, and legal risks of signing on to the ECT clearly outweigh the claimed benefits, any expansion of the treaty to become a quasi-universal agreement should be treated with extreme caution. It is essential that politicians, journalists, civil society, and the wider public in accession countries shine a light on this outdated agreement, which will greatly influence the battle over our future energy systems.

Given the risks that the ECT poses to signatory states as well as the global environment, all attention should be focused on averting the silent geographical expansion of this dangerous agreement – and on taking determined action so that existing member states withdraw from it. This would be a significant step in pushing back against the corporate power stranglehold that can keep governments from acting in the interest of their people and the planet.

While the system is in the state it's in right now, signing any new treaty is a very serious mistake. You have to weigh the benefits against the burdens. Somebody at some point might be able to explain to me where all the benefits are, but I certainly haven't seen any.

Lawyer George Kahale III who has defended many countries in investor-state claims¹¹⁶

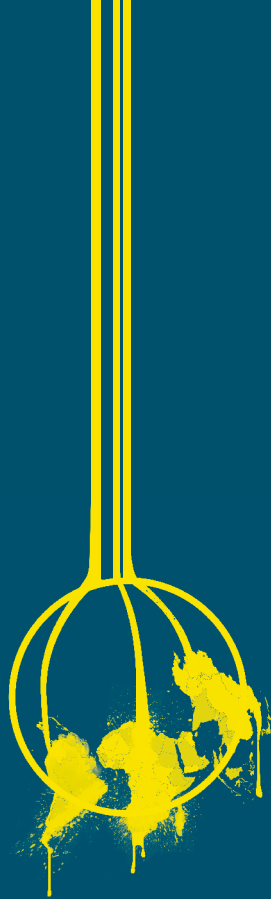
Notes

- 1 Afghanistan, Albania, Armenia, Austria, Azerbaijan, Belarus (which has not ratified the ECT, but applies it provisionally), Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy (which left the ECT in 2016, but can still be sued under certain conditions), Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Mongolia, Montenegro, The Netherlands, Poland, Portugal, Romania, Russia (which has never ratified the ECT and withdrew its provisional application in 2009, but has still been sued many times), Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, and Yemen (see Image 1 on page 2 for more details).
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