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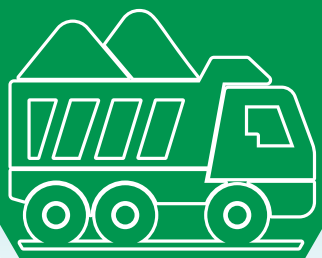

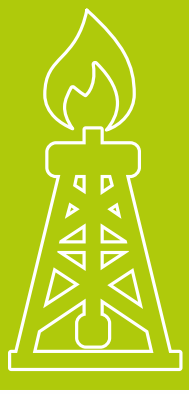

Meet the Energy Charter Treaty

Curbing climate action since 1998

Meet the Energy Charter Treaty – curbing climate action since 1998

What is the ECT and what makes it an obstacle to Paris Agreement-compliant transition plans?

An out-dated framework with dire consequences for future climate regulation

The Energy Charter Treaty (ECT) is a legal framework from the 1990s that bypasses national laws and allows companies in the energy sector to sue states for compensation. In the context of the ECT these companies are generally referred to as 'foreign investors'. The ECT is an international agreement that is at least partially applied in 53 states, including the European Union and its member states, countries in the Middle East and Central Asia, and Japan.

At its core is the principle that investors can sue states over actions that have supposedly 'damaged' investments, like a state-regulated, mandatory phase-out of fossils. Energy companies have successfully sued states for billions of Euros in compensation or used an ECT compensation claim as blackmail to weaken climate policies as recently as this year. So far, the total sum of compensation claims successfully made by investors against states has surpassed €46 billion[I].

Seeking to align a company's business model with the Paris Agreement and threatening to or filing claims under the Energy Charter Treaty are incompatible - because the latter risk slowing down and weakening the energy transition, and making it more expensive for the public. Responsible shareholders need to be clear that Paris-compliant transition plans must include a pledge that the ECT will not be used to prolong the life of fossil assets.

An intransparent, easily corruptible system

The ECT gives investors sweeping powers to sue states

The ECT is extremely one-sided and heavily favors the claimant investors: only investors can sue a state for compensation. States have no legal basis to sue investors under the ECT and neither have affected communities, for example, if the investor pollutes their environment.

Paralegal framework, secret proceedings, private lawyers instead of independent judges

Arbitrations under the ECT can be kept completely secret while there is often little information available when proceedings do become known. The legal decisions in ECT cases are not made by independent judges, but rather by three private lawyers, so called "arbitrators". Most cases are decided by a very small pool of about 25 people[II]. Unlike independent judges in public courts, who receive fixed salaries that don't depend on the length or outcome of a case, ECT arbitrators get paid lucratively per case - in the most frequently used forum they receive $3,000 for every single day spent in court.

This incentivizes arbitrators to decide in favor of the investors. Investors are the only ones who can initiate ECT claims. The more cases are brought before the paralegal ECT courts, the more money the arbitrators can potentially make. Similarly, the more ECT cases that are decided in favor of investors, the more investors may be incentivized to file similar claims in the future with the same small group of arbitrators. The compensation amounts the arbitrators can order states to pay are not capped and regularly include compensation for hypothetical lost expected future profits.

> *"Compensation orders are retrospective and uncapped... As a result, countries face unique incentives to avoid climate change action in order to limit their potential liability,"*
> *says Professor Gus van Harten of Osgoode Hall Law School in Toronto, Canada*[III]

I https://www.foeeurope.org/climate-killer-deal-tackle-next-180520
II https://www.energychartertreaty.org/cases/statistics/
III https://core.ac.uk/download/pdf/232637624.pdf

RWE's gas-fired power plant in Duisburg-Huckingen

A powerful tool for mailbox companies[IV]

The ECT only allows investors based in member states that are signed to the treaty to file ISDS claims. However, there have been cases of companies registered in non-ECT member states using shell corporations or letterbox companies to successfully sue ECT states for compensation. In 2015, for example, in a dispute over a uranium mine, an ECT tribunal ordered Mongolia to pay over US$80 million (plus interest and legal costs) to Canadian mining company Khan Resources. Canada is no party to the ECT, but Khan Resources had lodged its claim via a 'letterbox' company in the Netherlands and the arbitrators happily accepted the case.[V]

Fatal impact on climate regulation

Chilling Effect

ECT claims can have a negative impact on governments' ambitions to adopt progressive climate legislation. Germany's coal exit law, for example, requires a coal phase-out by 2038, a date that is eight years too late to be aligned with the Paris Agreement. The law also foresees the jaw-dropping amount of €4.35 billion in compensation payments to coal companies. This amount is €2 billion higher than the compensation believed to be adequate, based on economic predictions. This high payout was clearly intended to preempt claims under the ECT and other investor-state dispute settlement treaties: in exchange for waiving their right to sue the German state, coal companies such as EPH will receive huge compensation payments from the government. Germany's decision to pay off polluters for an insufficient coal phase-out has been met with an outcry from taxpayers. However, the state's fear of being sued for even larger numbers under the ECT seem to have outweighed its fear of ongoing public criticism.[VI]

IV https://energy-charter-dirty-secrets.org/
V https://corporateeurope.org/sites/default/files/attachments/one_treaty_to_rule_them_all.pdf
VI https://www.zeit.de/wirtschaft/2020-07/kohleausstieg-energiewende-leag-rwe-entschaedigung-bundesregierung

In the Netherlands, the planned coal phase-out will end in 2030; a more timely phase-out date than Germany. However, the date should have been more ambitious, as climate experts and civil society organizations have pointed out. Dutch politicians clearly had the ECT on their mind when they decided not to set a more ambitious and effective timeline for the Dutch coal phase-out.

> *"Our democratic decisions are overruled by these companies starting lawsuits. It's slowing down what needs to be done for the climate and eats up large sums of money that we urgently need to fight climate change,"*
> *says Sandra Beckerman,*
> *member of the Dutch Parliament.*[VII]

Tax money

Tax money is used to pay the claimants' compensation and the often substantial legal costs in a case. This money would be urgently needed for a fair transition to renewables and to fix environmental damage already caused by the claimants. Often, compensation is paid for projects that were doomed from the beginning. The suing companies usually claim compensation for so-called loss of "future profits". This includes profits they could have made from fossil fuels in the far future if they did not have to shut their assets down early due to climate regulations. Such future profit claims are naturally inaccurate and often vastly exceed realistic profits.

List of utilities that have used or are threatening to sue under the ECT[VIII]

Uniper's gas-fired power plant in The Hague

Fortum/Uniper

Fortum's subsidiary Uniper is currently threatening to sue the Netherlands under the ECT for its mandatory coal phase-out by 2030. The company's Dutch coal plant was commissioned in 2016, at a time when it had already been sufficiently clear that the age of coal was over. Making the situation even more bizarre is the fact that Fortum is a Finnish state-owned company. Finland has adopted even more ambitious climate legislation than the Netherlands. As a result, the Finnish state would be using the ECT to sue another state for compensation due to a coal phase-out law that is actually less ambitious than its own.[IX]

Vattenfall

When the German city-state of Hamburg introduced stricter environmental regulations for Vattenfall's coal power plant Moorburg in 2009, the Swedish utility company demanded €1.4 billion in compensation for lost "future profits" and filed an ISDS claim under the ECT. When faced with this exorbitant sum that would have been paid with taxpayer money and could have caused public outrage, the Hamburg senate caved and settled. The city government lowered the environmental regulations that among others govern the use of freshwater taken directly from the river Elbe to cool the coal plant. In 2017, the European Court of Justice ruled that Germany had violated EU environmental laws in granting Vattenfall permission to construct the Moorburg plant. This case shows how states would rather risk breaking their own environmental laws than face astronomical compensation claims filed by investors under the ECT.

VII https://www.zdf.de/politik/frontal-21/energiecharta-vertrag-wie-kohlekonzerne-abkassieren-100.html
VIII https://power-shift.de/wp-content/uploads/2020/02/Wie-der-Energiecharta-Vertrag-ambitionierte-Klimapolitik-gef%C3%A4hrdet-Fact-Sheet-1.pdf
IX https://www.youtube.com/watch?v=uZ3r6OwKM-k&feature=emb_logo

Vattenfalls' coal power plant in Hamburg-Moorburg

A "Trabucco", an old fishing machine, off the coast of the Abruzzi in the Adriatic Sea

Rockhopper

In 2015, the Italian parliament banned oil and gas projects within 12 nautical miles off the Italian coast, following extensive public protests against fossil fuel projects and pressure from civil society groups. Two years later, the British oil and gas exploration company Rockhopper sued the Italian government for not giving the company permission to drill for oil off the Adriatic coast. Rockhopper had acquired the licenses for its planned offshore project Ombrina Mare from another company in 2014, fully aware of a lack of sufficient permissions and the public protests. Nevertheless, the British company used the ECT to sue the Italian state for compensation for the $50 million invested in the obsolete drilling licenses as well as an additional $300 million in lost "future profits".[X]

Vermilion

The French Minister for the Environment, Nicolas Hulot, had to experience just how severely the ECT can increase investor and lobbyist pressure, affecting climate legislation and potentially ending careers. In the summer of 2017, Hulot proposed a staggered ban of oil and gas extraction. His plan foresaw the first projects to end in 2021, with the majority of extraction programs forced to shut down by 2030 and a total ban of oil and gas extraction on French territory by 2040. Vermilion, a Canadian oil and gas company responsible for 75% of oil and gas production in France, threatened to file an ISDS claim against the French state under the ECT, should Hulot's proposed law become instated. A few months later, Hulot proposed an amended oil and gas phase-out law that could hardly have been more different from the first draft: permissions for oil and gas extraction could now be renewed until at least 2040. A year later, Nicolas Hulot stepped down from his position as Minister for the Environment, citing investor and lobbyist pressure as having become too overwhelming to be able to continue doing his job.[XI]

Mission Modernisation Impossible

The EU, which has called the ECT an "outdated" and "no longer sustainable" agreement has pushed for negotiations to modernise the ECT, which started in 2019. But any amendments done to the ECT have to be agreed upon unanimously by all member states signed to the treaty. However, a significant number of member states heavily depend on fossil fuel extraction or processing. Countries like Kazakhstan, whose economies are centered around the export or transit of fossil fuels, are opposed to any form of modernization of the treaty that would support an exit from coal, oil and gas. Another influential member, Japan, has already stated that it sees absolutely no need to reform the ECT.

X https://10isdsstories.org/cases/case9/
XI https://10isdsstories.org/cases/case5/

150 Parliamentarians from across Europe called on EU member states “to explore pathways to jointly withdraw from the ECT by the end of 2020

> *“The Energy Charter Treaty is fundamentally opposed to climate protection. That is why it must be reformed very deeply. Or we as Europeans have to simply get out,”*
> *says Claude Turmes,*
> *Energy Minister of Luxembourg.*[XII]

The Zombie-clause

Calls for exiting the ECT are growing amongst civil society organisations and Parliamentarians. In September 2020, 150 Parliamentarians from across Europe called on EU member states “to explore pathways to jointly withdraw from the ECT by the end of 2020” if there was no progress in the modernisation talks[XIII]. A joint withdrawal of half of the ECT’s membership would significantly weaken the treaty. And it would be a way to tackle another ECT problem: its survival clause.

The survival clause means that countries that leave the ECT can still be sued for 20 years after their exit from the treaty. This survival clause turns the ECT into a zombie that can live on and haunt governments even after its death. It does not make a unilateral withdrawal meaningless though, as post-withdrawal projects are shielded from costly ECT claims. In a mass exit, however, EU member states could declare that the sunset clause no longer applies amongst them - therefore putting an end to what is today the majority of ECT claims: so called intra-EU disputes, where an investor based in one EU country (e.g. Fortum/ Uniper) sues another EU member state (e.g. the Netherlands).

Conclusion

The ECT is one of the most detrimental lobbying tools fossil energy companies have. Companies can not claim to be taking the climate crisis and their role in it seriously and at the same time file ISDS cases to be compensated for loss of “future profits” from fossils. Europe’s biggest CO_2 emitters such as RWE, Fortum/Uniper and Vattenfall have all used the flawed, intransparent ECT framework to weaken and delay climate regulations and to attempt to pocket billions of dollars that should have rather been invested in the transformation of the energy system. It is bizarre that European companies use the ECT against climate legislation of EU member states, while the European Union made common commitments in the Paris Agreement.

Using the ECT to sue countries for their coal, oil and gas exit laws means directly opposing climate action for corporate financial gains. Even threatening to file ISDS claims under the ECT can not be reconciled with striving to be a Paris Agreement-aligned company.

XII https://www.euractiv.com/section/energy/news/obsolete-energy-charter-treaty-must-be-reformed-or-ditched-lawmakers-say/
XIII https://www.euractiv.com/wp-content/uploads/sites/2/2020/09/Statement-on-Energy-Charter-Treaty-ENG_080920.pdf

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