ONE TREATY TO RULE THEM ALL

The ever-expanding Energy Charter Treaty and the power it gives corporations to halt the energy transition

CEO tni transnationalinstitute

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Executive summary

Two decades ago, and without significant public debate, an obscure international agreement entered into force, the Energy Charter Treaty (ECT). It acts like the secret magical "One Ring to rule them all" from the Lord of the Rings trilogy, granting corporations enormous powers over our energy systems including the ability to sue governments, which could obstruct the transition from climate-wrecking fossil fuels towards renewable energy. And the ECT is in the process of expansion, threatening to bind yet more countries to corporate-friendly energy policies.

Today the ECT applies to nearly 50 countries stretching from Western Europe through Central Asia to Japan. Among its many provisions, those regarding foreign investments in the energy sector – also known under the infamous acronym ISDS or investor-state dispute settlement – are the ECT's cornerstone.

The ECT's ISDS provisions give foreign investors in the energy sector sweeping rights to directly sue states in international tribunals of three private lawyers, the arbitrators. Companies can be awarded dizzying sums in compensation for government actions that have allegedly damaged their investments, either directly through 'expropriation' or indirectly through regulations of virtually any kind. Energy giant Vattenfall, for example, has sued Germany over environmental restrictions on a coal-fired power plant and for phasing out nuclear power. Oil and gas company Rockhopper is suing Italy over a ban on offshore oil drilling. Several utility companies are pursuing the EU's poorest member state, Bulgaria, after the government reduced soaring electricity costs for consumers.

Yet the ECT and its profiteers have largely escaped public attention. While the past decade has seen a storm of opposition to ISDS in other international trade and investment deals the ECT has managed to steer surprisingly clear of this public outrage. Many investor lawsuits under the treaty remain secret. For others, there is only scant information available. And in countries in the process of acceding to the ECT, hardly anyone seems to have even heard of the agreement, let alone have thoroughly examined its political, legal, and financial risks.

This report shines a light on the "one ring" of the ECT, which will greatly influence the battle over our future energy systems, as well as the corporations and lawyers, to which it grants enormous powers.

Key findings

1.

No trade and investment agreement anywhere in the world has triggered more investor-state lawsuits than the ECT. At the time of going to press in June 2018, the ECT Secretariat listed a total of 114 corporate claims filed under the treaty. Given the opacity of the system, the actual number of ECT claims could be much higher.

2.

In recent years the number of ECT investor lawsuits has exploded. While just 19 cases were registered during the first 10 years of the agreement (1998-2008), 75 investor lawsuits were filed in the last five years alone (2013-2017).* This trend is likely to continue.

3.

More recently, investors have begun to use the ECT to sue countries in Western Europe. While in the first 15 years of the agreement 89 per cent of ECT-lawsuits hit states in Central and Eastern Europe, and Central Asia, today Spain and Italy head the list of the most-sued countries. The ECT remains the only effective treaty in which Western European states have accepted ISDS with countries that are also capital exporters to them. It is also the only agreement which allows for investor-state arbitrations against the EU as a whole.

4.

More and more money is at stake for states and taxpayers. There are 16 ECT suits in which investors – mostly large corporations or very wealthy individuals – sued for US$1 billion or more in damages.* Some of the most expensive claims in the history of ISDS include ECT cases such as Vattenfall's challenge to Germany over its exit from nuclear power (over US$5.1 billion), and the largest ISDS award ever, a US$50 billion order against Russia in the Yukos cases. Total legal costs average US$11 million in ISDS disputes, but can be much higher.

5.

Corporations claim compensation for loss of 'future profits'. Oil company Rockhopper is not just claiming the US$40-50 million from Italy which it actually spent on exploring an oil field in the Adriatic Sea. It also claims an additional US$200-300 million for hypothetical profits the field could have made had Italy not banned new oil and gas projects off the coast.

6.

Governments have been ordered or agreed to pay more than US$51.2 billion in damages from the public purse* – roughly equalling the annual investment needed to provide access to energy for all those people in the world who currently lack it. Outstanding ECT claims* have a collective value of US$35 billion – far more than the estimated annual amount of money needed for Africa to adapt to climate change.

7.

Investors who have filed lawsuits under the ECT come mostly from Western Europe. Companies and individuals registered in the Netherlands, Germany, Luxembourg, and the UK (or in the tax haven Cyprus) make up 60 per cent of the 150 investors involved in claims.*

8.

The majority of ECT claims are intra-EU disputes, yet sideline EU courts. 67 per cent of ECT investor lawsuits* were brought by an investor from one EU member state against the government of another member state, claiming large sums of public money arguably not available to them under the EU legal system. That means that nearly half of all known intra-EU investment disputes were launched under the ECT (the others being based on bilateral treaties). In March 2018 the European Court of Justice ruled that intra-EU ISDS proceedings under these bilateral treaties violate EU law as they sideline EU courts – an argument which could also apply to the ECT.

9.

The ECT is prone to abuse by letterbox companies, which mainly exist on paper and are often used for tax evasion and money laundering. For example 23 of the 24 "Dutch" investors who have filed ECT-lawsuits* are letterbox companies. They include Khan Netherlands (used by Canadian mining company Khan Resources to sue Mongolia even though Canada is not even a party to the ECT), and Isolux Infrastructure Netherlands and Charanne (both used by Spanish businessmen Luis Delso and José Gomis, two of the richest Spaniards, to sue Spain). Thanks to the ECT's overly broad definition of "investor" and "investment", states can effectively be sued by investors from around the globe, including by their own nationals.

10.

The ECT is increasingly being used by speculative financial investors such as portfolio investors and holding companies. In 88 per cent of lawsuits over cuts to support schemes for renewable energy in Spain, the claimant is not a renewable energy firm, but an equity fund or other type of financial investor, often with links to the coal, oil, gas, and nuclear industries. Several of the funds only invested when Spain was already in full-blown economic crisis mode and some changes to the support schemes had already been made (which the funds later argued undermined their profit expectations). Some investors view the ECT not only as an insurance policy, but as an additional source of profit.

11.

The ECT is a powerful tool in the hands of big oil, gas, and coal companies to discourage governments from transitioning to clean energy. They have used the ECT and other investment deals to challenge oil drilling bans, the rejection of pipelines, taxes on fossil fuels, and moratoria on and phase-outs of controversial types of energy. Corporations have also used the ECT to bully decision-makers into submission. Vattenfall's €1.4 billion legal attack on environmental standards for a coal-fired power plant in Germany forced the local government to relax the regulations to settle the case.

12.

The ECT can be used to attack governments that aim to reduce energy poverty and make electricity affordable. Under the ECT Bulgaria and Hungary have already been sued for compensation in the hundreds of millions, in part for curbing big energy's profits and pushing for lower electricity prices. Investment lawyers are considering similar action against the UK, where the government has proposed a cap on energy prices to end rip-off bills.

13.

A small number of arbitrators dominate ECT decision-making. 25 arbitrators have captured the decision-making in 44 per cent of the ECT cases while two-thirds of these super-arbitrators have also acted as legal counsel in other investment treaty disputes. Acting as arbitrator and lawyer in different cases has led to growing concerns over conflicts of interest, particularly because this small group of lawyers have secured extremely corporate-friendly interpretations of the ECT, paving the way for even more expensive claims against states in the future.

14.

Five elite law firms have been involved in nearly half of all known ECT investor lawsuits. Law firms have been key drivers of the surge in ECT cases, relentlessly advertising the treaty's vast litigation options to their corporate clients, encouraging them to sue countries.

15.

Third party funders are becoming more and more established in ECT arbitrations. These investment funds finance the legal costs in investor-state disputes in exchange for a share in any granted award or settlement. This is likely to further fuel the boom in arbitrations, increase costs for cash-strapped governments, and make them more likely to cave in to corporate demands.

16.

There are concerns about self-dealing and institutionalised corruption in institutions that administer ECT disputes. For example the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), prominent in ECT disputes, is problematic because its arbitrations are particularly secretive, prone to conflicts of interest, and potentially more biased against states than other proceedings.

17.

Polluting companies and for-profit investment lawyers enjoy privileged access to the ECT Secretariat, which puts into question the latter's neutrality and ability to act in the interest of the ECT's signatory states as well as a transition off fossil fuels. More than 80 per cent of the companies on the ECT's Industry Advisory Panel make money with oil, gas, and coal. Two thirds of the lawyers on the ECT's Legal Advisory Task Force have a financial stake in investor lawsuits against states. Both advisory groups are given ample opportunities to influence the Secretariat, ECT member states, and the wider Charter process in their own interest. Several high-ranking officials at the ECT Secretariat were with arbitration law firms before and/or after they worked at the Secretariat.

18.

Many countries across the world are about to join the ECT, threatening to bind them into corporate-friendly energy policies. Jordan, Yemen, Burundi, and Mauritania are most advanced in the accession process (ratifying the ECT internally). Next in line is Pakistan (where investment arbitration is controversial, but which has already been invited to accede to the ECT), followed by a number of countries in different stages of preparing their accession reports (Serbia, Morocco, Swaziland – renamed eSwatini in April 2018 –, Chad, Bangladesh, Cambodia, Colombia, Niger, Gambia, Uganda, Nigeria, and Guatemala). Many more countries have signed the non-binding International Energy Charter political declaration, which is considered the first step towards accession to the legally binding Energy Charter Treaty.

19.

There is an alarming lack of awareness about the ECT's political and financial risks in the ECT's potential new signatory states. Officials from ministries with experience in negotiating investment treaties and defending investor-state arbitrations are largely absent from the process, which is being led by energy ministries. This is worrying as many of these countries already have disastrous experience with investor lawsuits under other investment agreements, which could multiply if they sign on to the ECT.

20.

The expansion process is aggressively promoted by the ECT Secretariat, the EU, and the arbitration industry, who are eager to gain access to the rich energy resources in the global South and to expand their own power and profit opportunities. While they downplay or dismiss the risks to states of acceding to the ECT, they promote the agreement as a necessary condition for the attraction of foreign investment, and in particular clean energy investment for all. But there is currently no evidence that the agreement helps to reduce energy poverty and facilitate investment, let alone investment into renewable energy.

But there is some good news. Around the world, the tide is turning against ECT-style super-rights for corporations. Campaigners, activists, academics, and parliamentarians are beginning to ask critical questions about the ECT. The agreements and the investor lawsuits it has enabled could also come under legal fire from EU courts. More countries could follow the example of Russia and Italy, which have already turned their back on the ECT.

This report warns of the dangers of expanding the ECT to an ever-growing number of countries and concludes with eight key reasons for leaving – or not joining – the ECT. Just as in the Lord of the Rings, where the "fellowship" of nine companions around the little hobbit Frodo Baggins manages to destroy the One Ring, a fellowship of citizens, legal scholars, parliamentarians, courts and governments might be in the making, which will eventually break the binding power of the ECT "ring".

* Figures refer to the total ECT cases known about up to the end of 2017. There are likely to be others that, due to secrecy in the claims process, have not come to light.

One Treaty to rule them all,
One Treaty to find them,
One Treaty to bring them all
and in the darkness bind them

J.R.R: Tolkien, Lord of the Rings

Chapter 1
Introduction

In the famous Lord of the Rings trilogy the Dark Lord Sauron forges a secret magical ring to dominate Middle Earth. Through this "One Ring to rule them all" he can enslave others to his will. In today's struggle against climate change and for a just and democratic energy transition, the ring is a little known international agreement: the Energy Charter Treaty (ECT). It allows corporations to sue governments and has been responsible for multi-million dollar payouts of taxpayers' money to energy firms. It can be used to lock countries into the use of climate-wrecking fossil fuels, shield disastrous energy projects from public opposition, and cement the power of big business over our energy systems. And it is in the process of expansion, threatening to bind even more countries to corporate-friendly energy policies.

The ECT is an international agreement dating from the mid-1990s of nearly 50 countries stretching from Western Europe through Central Asia to Japan. Under the treaty foreign investors can sue signatory governments over measures in the energy sector that they consider harmful to their profits. For example energy giant Vattenfall has sued Germany over environmental restrictions on a coal-fired power plant and for phasing out nuclear power. Oil and gas company Rockhopper is suing Italy over a ban on offshore oil drilling. Several utility companies are pursuing the EU's poorest member state, Bulgaria, because the government reduced soaring electricity costs for consumers.

These lawsuits do not take place in ordinary courts. Under the ECT corporations can sue governments before an international tribunal of three private lawyers. These tribunals have the power to order states to pay billions of taxpayers' money to compensate investors, including for the alleged impact on company profits of laws that aim to reduce greenhouse gas emissions, make energy affordable, or reverse failed privatisations.

In recent years the number of corporate ECT lawsuits has exploded. Globally no other trade or investment agreement has triggered more investor-state claims than the ECT. Many more could follow if governments take the strong measures to transform the energy sector that are needed if we are to have a chance of preventing extremely dangerous levels of global warming. For example corporations could use the ECT to challenge decisions to scale back subsidies for climate-wrecking fossil fuels, shut down dirty coal mines, or stop new oil and gas pipelines.

In spite of its risk to public budgets and governments' policy-space to protect people and the climate, many countries in Africa, the Middle East, Asia, and Latin America are on the path towards signing on to the ECT with its dangerous investor privileges. This process is actively driven by the current contracting states, the ECT Secretariat, and the very lawyers and corporations who profit from the agreement. They want to globalise the ECT to make it a kind of World Trade Organisation (WTO) for energy.

This report warns of the dangers of expanding the ECT to an ever-growing number of countries. It also shines a light on the companies and lawyers that have profited most from the ECT lawsuit bonanza. Driven by their own financial interests – and in tandem with the ECT Secretariat – both the legal and energy industries work eagerly to secure or expand their own businesses by encouraging an ever-increasing number of costly corporate claims, or by lobbying for an expansion of the agreement.

Until now the ECT and its profiteers have largely escaped public attention. While the past decade has seen a storm of opposition to similar corporate privileges in other international trade and investment agreements – such as TTIP, the now-stalled Transatlantic Trade and Investment Partnership between the EU and the US – the ECT has stayed under the radar and managed to steer surprisingly clear of this public outrage. Many investor lawsuits under the treaty remain secret. For others there is only scant information available. And in countries which are in the process of acceding to the ECT, hardly anyone seems to have even heard of the treaty, let alone have thoroughly examined its political, legal, and financial risks.

It is therefore high time to take a closer look at this "One Ring to rule them all", a treaty which will wield great influence on the battle over our future energy systems. And it is also time to shine a light on the corporations and lawyers to which it grants enormous power.

Chapter 2

Private gain, public cost: an obscure agreement lets corporations sue countries

On 28 April 1998 negotiations for the Multilateral Agreement on Investment (MAI) collapsed amidst cheers from consumer, environmental, and development groups from around the world. They had mobilised against this one-sided bill of rights for transnational corporations which stood in stark opposition to their agenda for a sustainable and just world. What the groups did not know was that just days earlier on 16 April 1998 another multilateral investment agreement had already entered into force without any public debate – the Energy Charter Treaty (ECT). The true consequences of this arcane treaty, which for 20 years has served the needs of big energy, urgently need to come into the spotlight.

The ECT is an international agreement for the energy sector, which applies to nearly 50 countries in Western and Eastern Europe, Central Asia, and Japan (see image 1 on pages 16-17).[1] It contains a myriad of rules – including on energy transit and trade – but the provisions regarding protections for foreign energy investments are its cornerstone.

The ECT gives sweeping powers to foreign investors in the energy sector, including the peculiar privilege to directly sue states in international tribunals consisting of three private lawyers, the arbitrators. In these tribunals companies can claim dizzying sums in compensation for government actions that have allegedly damaged their investments, either directly through expropriation or indirectly through regulations of virtually any kind (see box 1 on page 14.).

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 & Flom [2]

This investor-state dispute settlement system – also known under the acronym ISDS – can be used to dispute any action by a nation state that could affect an investment: laws and regulations from parliaments, 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 mere shareholders can sue and corporations can claim not just for the money invested, but for future anticipated earnings as well. Sometimes the filing of a costly dispute – or a mere threat behind the scenes – can be enough to freeze government action, when policymakers realise they would have to pay to regulate.

Big oil's long arm into the East

The ECT was negotiated over a period of three years and was signed in December 1994. The idea was that of then Dutch Prime Minister and former businessman Ruud Lubbers, a "more markets, less government"[3] neoliberal in the style of Margaret Thatcher and Ronald

Box 1

Some key ECT investor lawsuits against states

Corporations versus environmental protection – Vattenfall v. Germany I & II: 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 effects that the plant will have on the Elbe river and its wildlife. In 2012 Vattenfall sued again, seeking €4.3 billion plus interest for lost profits related to two of its nuclear reactors. The case challenges the decision to speed up Germany's phase-out of atomic energy, following the Fukushima disaster in 2011 and decades of strong anti-nuclear protests across the country (see boxes 3 and 5 on pages 22 and 44).

Corporations versus bans on oil drilling – Rockhopper v. Italy: In May 2017 UK-based oil and gas company Rockhopper sued Italy over the state's refusal to grant a concession for off-shore 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 and high earthquake risks. Rockhopper is demanding "very significant monetary damages",[4] including for lost future profits, potentially many times its estimated sunk costs of about US$40 to 50 million. The claim was actually registered 17 months after Italy's exit from the ECT took effect. This is possible because the treaty protects investors for 20 more years after a country withdraws from it (see box 12 on page 81).

Corporations versus nuclear safety – Khan Resources v. Mongolia: In 2015 a tribunal ordered Mongolia to pay over US$80 (plus interest and legal costs) to Canadian mining company Khan Resources which had sued the country via a 'letterbox' company, ie one with a registered address but no substantial business activity in the Netherlands.[5] Mongolian regulators had invalidated licenses for a uranium mine following a new nuclear energy law and inspections which had found breaches of radiation and safety laws at the site (such as radioactive material being stored in protected areas). A few months after Mongolia paid out US$70 million of the award in 2016 (as agreed with Khan in post-award negotiations), the company's shareholders decided to liquidate the firm,[6] walking away with US$20 million in extra profits (according to its own account, Khan had only spent US$50 million on the project).[7]

Corporations versus affordable electricity – EVN, Energo-Pro and ČEZ v. Bulgaria: Bulgaria is battling three investor claims by energy companies from Austria (EVN, filed in 2013) and the Czech Republic (Energo-Pro and ČEZ filed 2015 and 2016).[8] Among other things the companies are challenging a government decision to reduce skyrocketing energy prices. Following protests against high utility bills across the EU's poorest member state in 2013, Bulgaria's regulators cut electricity costs for consumers by an average of seven percent. The investors argue that "these actions reduce the proceeds from the sale of electric energy".[9] Exactly how much money they are claiming is unknown, but ČEZ alone speaks of "hundreds of millions of euros".[10]

> **European oil and gas companies were eyeing new business opportunities among Eurasian countries.**
>
> Urban Rusnák, Secretary General of the ECT on its origins in the early 1990s[11]

Reagan. Keen on accessing the vast oil and gas resources of the former Soviet Union, other Western European governments quickly jumped on his idea for a West-East framework for energy cooperation.

Non-European countries were also involved: Japan, Australia (which signed but never ratified the ECT), the US, and Canada (both never signed). But the EU and its member states were clearly leading the project, "not only as a coordinator, but also as driving force behind the negotiations".[12] The UK and the Netherlands, both of whom had developed their own bilateral investment treaties with significant input from giant oil company Shell,[13] were especially influential in the talks. The ECT's investor rules were even modelled along the standard UK treaty at the time[14] – a fact that Shell must have appreciated.

While negotiations "took place largely outside the pressure of external scrutiny",[15] large oil and gas corporations such as Exxon, Mobil (still separate US companies at the time), Shell, ENI, BP, and Repsol closely tracked the talks from the outset. Fossil fuel industry lobby groups such as the E&P Forum (later renamed the International Association of Oil and Gas Producers), and Eurogas and Europia (today known as FuelsEurope) had regular meetings with lead negotiators and were invited to comment on draft versions of the future treaty. They demanded that its "principal emphasis… should be on guarantees for the protection of investments" and that the agreement "give investors the right to enforce certain key provisions directly against the host government through arbitration".[16] In other words: big oil had requested exactly those corporate privileges which later formed the core of the Energy Charter Treaty.

The investor should have the right to take any dispute with… the host country to binding and enforceable arbitration… without first resorting to the domestic courts.

Oil industry lobby group E&P Forum's initial wish-list for the future ECT, dated 1991[17]

A treaty-signing binge

Non-Western delegations were much less active in the ECT talks. Until the very end, according to accounts from the time, negotiators from Eastern Europe and Russia had some "problems" in grasping key "terms and principles" of the ECT while Western parties "spent a lot of time explaining" them.[18] One arbitration expert even commented that some former Soviet Union members signed the ECT because "it was a chance to flex their newly acquired statehood", adding that treaties are to states "what alcohol and driving are to teenage boys".[19]

According to the main legal advisor to the negotiators, several ECT articles and their potential risks received only cursory review as the EU forced outstanding controversial issues to a conclusion. He describes the result as an "untidy", complex legal "package" of hard to manage "parts", "annexes", "decisions", "understandings", "declarations" and "interpretations".[20] In other words: a paradise for lawyers wanting to make money from it, but a nightmare for pretty much everyone else.

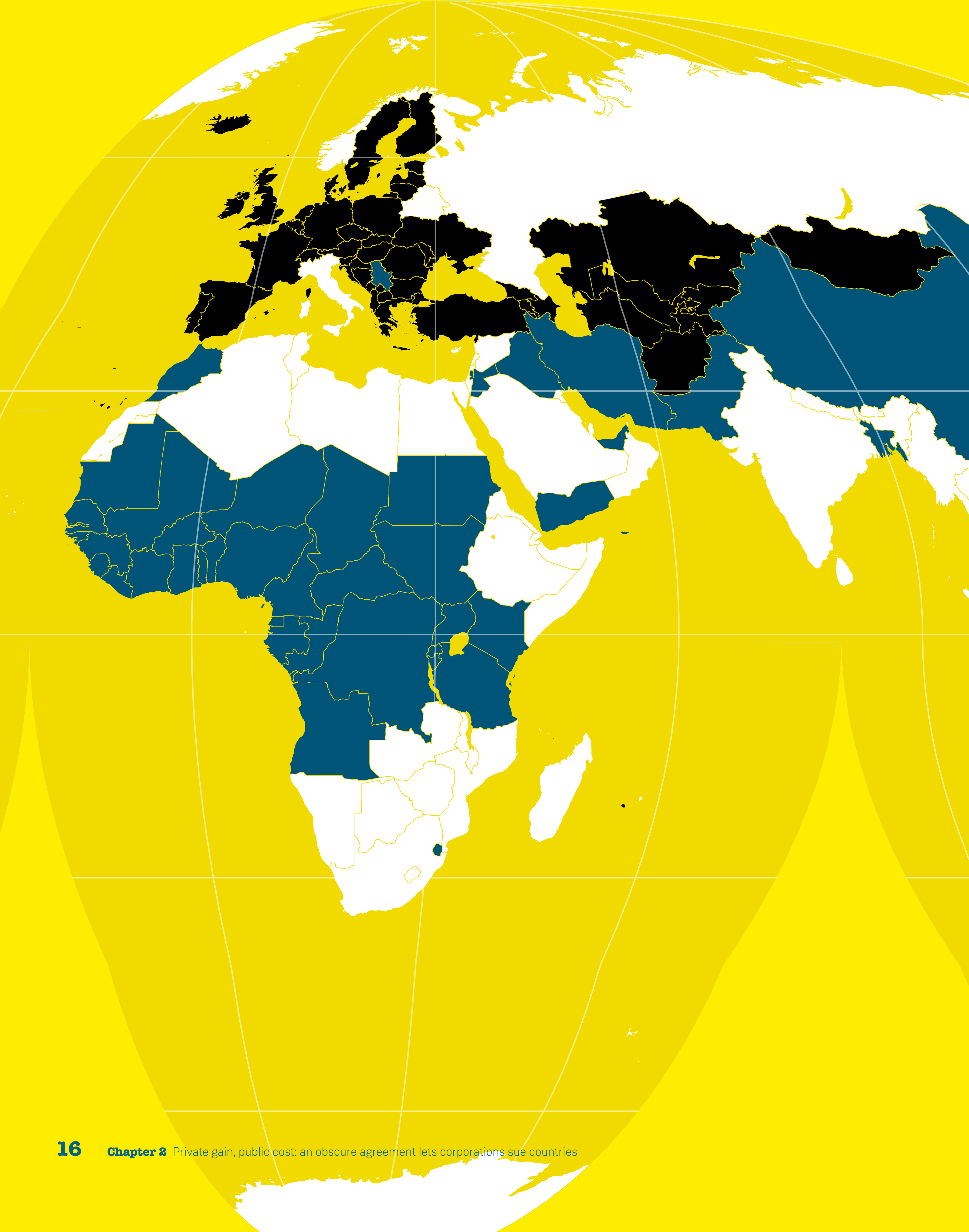
One of the legal scholars with early awareness of the ECT's inherent risks for governments was Thomas Wälde, an academic who also worked as lawyer, arbitrator and expert in investor lawsuits against states (including those filed via the ECT). When the ECT was signed Wälde wrote: "We suspect that the sometimes quite open-ended formulations of the Charter Treaty provide extensive opportunity for individuals to complain and litigate against governments.… The more open-ended such obligations, the more interpretation may create considerable surprise for the original negotiators and signatories of the Treaty."[22] Yet Wälde's insights about the ECT's legal risks did not keep him from being "a member of the team that hosted roadshows about the treaty in the various Soviet states, seeking their signatures".[23]

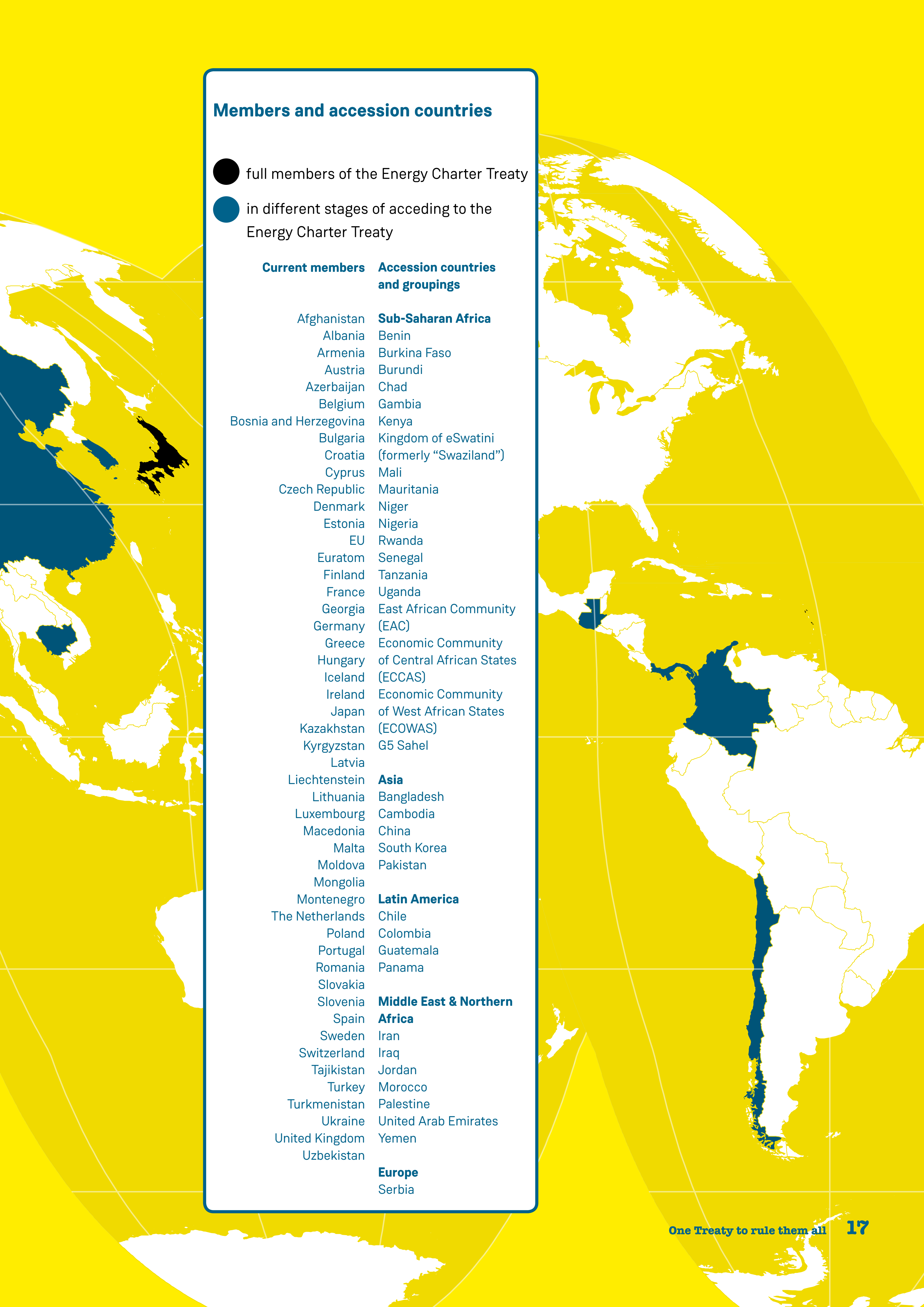
Negotiators really didn't know that the treaties had any bite in practice. They were neither aware of the costs or the fact that it could lead to arbitration.

Civil servant from the Czech Republic commenting on the country's investment deals from the 1990s[21]

Image 1

Energy Charter Treaty: members and accession countries





Members and accession countries

full members of the Energy Charter Treaty

in different stages of acceding to the Energy Charter Treaty

Current members

Afghanistan
Albania
Armenia
Austria
Azerbaijan
Belgium
Bosnia and Herzegovina
Bulgaria
Croatia
Cyprus
Czech Republic
Denmark
Estonia
EU
Euratom
Finland
France
Georgia
Germany
Greece
Hungary
Iceland
Ireland
Japan
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

Accession countries and groupings

Sub-Saharan Africa
Benin
Burkina Faso
Burundi
Chad
Gambia
Kenya
Kingdom of eSwatini (formerly “Swaziland”)
Mali
Mauritania
Niger
Nigeria
Rwanda
Senegal
Tanzania
Uganda
East African Community (EAC)
Economic Community of Central African States (ECCAS)
Economic Community of West African States (ECOWAS)
G5 Sahel

Asia
Bangladesh
Cambodia
China
South Korea
Pakistan

Latin America
Chile
Colombia
Guatemala
Panama

Middle East & Northern Africa
Iran
Iraq
Jordan
Morocco
Palestine
United Arab Emirates
Yemen

Europe
Serbia

Box 2
A primer on the ECT's investor privileges – and 10 reasons why corporations love them

Many analysts have noted "the Energy Charter Treaty's investor friendliness".[25] It is remarkably "asymmetric" in that it grants nothing but rights to foreign investors and offers nothing but obligations to the countries in which they invest.[26] Some lawyers say it offers an even "more robust level of protection"[27] for corporations than other investment treaties.

Here are 10 reasons why corporations love the ECT:

1. **The treaty protects a vast universe of investments "associated with an Economic Activity in the Energy Sector"** (article 1(6)).[28] Activities cover all sources of energy (oil, gas, coal, nuclear, renewables) all along the supply chain – from extraction and refining to energy storage, transport, distribution, trade, sale and the disposal of related waste (article 1(5)). It is noteworthy that under the ECT "investment" has been interpreted very differently from how it is commonly understood. In one case against Kyrgyzstan, for example, the arbitrators considered a mere business contract for the sale of gas as an investment, even though no money was actually spent on it.[29] Thus it is hard to imagine an activity in the energy sector which would not be covered by the ECT.
2. **If foreign investors feel that their rights have been violated, they can use the ECT's far-reaching investor privileges to file expensive lawsuits against signatory states at international tribunals,** bypassing their domestic legal systems (article 26(3)(a)). If a tribunal finds a violation of just one of the investor rights, it can order the defendant state to pay enormous and uncapped sums of taxpayers' money in compensation – including for lost hypothetical future profits.
3. **Rulings come from for-profit arbitrators who are paid lucratively by the case.** At the most frequently used tribunal for ECT disputes, the International Centre for Settlement of Investment Disputes (ICSID), arbitrators make US$3,000 a day.[30] This creates a strong financial incentive to decide in favour of those who can bring claims in the future: the investors. Investor-friendly decisions keep the ECT attractive for them, inviting even more lawsuits and arbitrator income.

States should "encourage and create stable, equitable, favourable and transparent conditions for investors" (article 10(1)). While this "fair and equitable treatment" provision appears innocuous, it has proven extremely dangerous for taxpayers and regulators as some arbitrators have interpreted it in a way that de facto requires countries to pay compensation when they change the law. In one case, for example, the tribunal found that Spain had violated the ECT because it had "radically altered" regulations for renewable energy producers, replacing them with "new and very different" rules, which were less beneficial for them. Big oil, gas and coal corporations could easily build similar cases against tough climate actions by regulators.[31]

> **Investment agreements have been designed primarily to protect the status quo. Conversely, compliance with the objectives of the Paris Agreement will require radical change: a future in which governments have met the collective goal of keeping below the 2°C guardrail is a future without fossil fuels.**
>
> Kyla Tienhaara, Australian National University[32]

4. **The ECT protects investors' 'legitimate expectations'**, according to how arbitrators have interpreted its "fair and equitable treatment" clause (article 10(1)).[33] This gives corporations a powerful weapon to fight regulatory change, even if implemented in light of new knowledge (for example, on root causes and solutions for climate change) and / or democratic choice.

5. **The ECT protects investors against expropriation** (article 13). From an investor-friendly point of view almost any law or regulation, for example to protect the environment or social well-being, can be considered an indirect "expropriation" when it has the effect of reducing profits. A 2012 study published by the ECT Secretariat found that the provisions on expropriation could lead to compensation orders against countries even in situations where a government decision might be considered non-compensable and legitimate under national law.[34] In other words: under the ECT, investors can walk away with potentially large amounts of taxpayers' money which would not be awarded to them in the domestic legal system.

The ECT gives investors legal rights above and apart from local law.

Arbitration lawyer Stephen Jagusch[35]

6. **ECT-lawsuits can be filed by all kinds of dubious shell companies and financial vehicles; the treaty is prone to 'treaty-shopping'** (ie investors, including from non-ECT states, who file lawsuits via a shell company based in one of the ECT member states). To be able to sue, investors merely have to be legally incorporated in one ECT signatory state and (in)directly own or control an energy related asset in another (for example, a license or share in a company). This is thanks to the ECT's extraordinarily broad definitions of "investor" and "investment" (articles 1(6) and (7)), which exposes states to unpredictable legal risk.[36]

7. **The ECT contains a dangerous 'umbrella clause', which gravely multiplies the risk of costly lawsuits** (last sentence of article 10(1)). It brings all obligations a state assumed with regards to an investment under the ECT 'umbrella', lifting them to the level of international law. It would, for example, empower an investor to file an ECT claim over the alleged breach of a mere contract with a municipality – even if the contract required recourse to domestic courts. Less than half of all the world's investment treaties contain an umbrella clause;[37] more recent agreements typically do not.

ISDS chapters are anomalous in that they provide protection for investors but not for States or for the population.

Open letter by ten independent UN experts and special rapporteurs[38]

8. **The ECT affords little room for regulatory action by states,** for example, to reduce greenhouse gas emissions. While it does contain exceptions to protect health and the environment (article 24(2)(i)), these explicitly do not apply to far-reaching investor rights such as "fair and equitable treatment" (article 24(2)(b)).

9. **If a country leaves the ECT it can still be sued for 20 more years** for investments made before the withdrawal (as happened to Italy, see box 12 on page 81). The 'survival' or 'zombie clause' (article 47(3)) allows the ECT's corporate super rights to live on after the treaty's death. Less than one sixth of the world's investment treaties include such a clause of 20 years.[39]

A stranger stumbling into an international arbitral hearing might fail to realise that a legal process was under way. The process would likely be happening in a hotel room or training room somewhere.

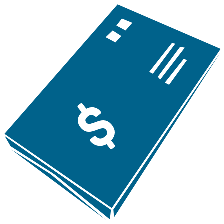
There would be two small groups on one side of the table, in standard business attire. On the other, a trio looking similar, with possibly a bit more grey hair. Something would clearly be going on, but you wouldn't immediately conclude it was deciding anyone's legal rights.

It's all very informal. There's no audience or usher and little hint of ceremony. It could be a training course – except for the stenographer tapping away. And yet millions, possibly billions, would be at stake.

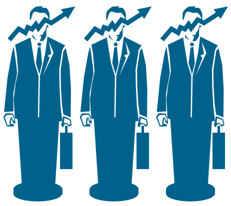
Global Arbitration Review magazine[24]

Image 2

The chronology of an ECT investment arbitration



Phase 1 The process starts when a **foreign investor sends a notice of arbitration to a state**. Unlike in other areas of international law, the claimant does not have to go through local courts first. Both, the investor and the state will be assisted by lawyers (counsel) during the proceedings.



Phase 2 The investor and the state jointly select the arbitration tribunal. Usually each party picks one arbitrator and both jointly appoint a third to serve as president. The arbitrators are private, for-profit lawyers, not judges, who are paid by the case.

Phase 3 Proceedings last years and mostly take place behind closed doors, with scant or no information at all released to the public, sometimes not even the fact that a case is happening.

Phase 4 The arbitrators ultimately determine if the state violated the ECT's investor rights and the size of the remedy. They also allocate the legal costs of the proceedings. Opportunities to challenge the rulings are extremely limited – even if they appear clearly wrong.

Phase 5 States have to comply with arbitral awards. If they resist, the award can be enforced by actual courts almost anywhere in the world by seizing the state's property elsewhere (for example, by freezing bank accounts or confiscating state aircraft or ships).

A legal nightmare for East and West

In its first 15 years investor lawsuits under the ECT mostly hit Central and Eastern Europe and Central Asia. Until 2013 the large majority of states which had to defend themselves under the treaty (89 per cent) were located in those regions.[40] Amongst other issues, investors challenged rules to curb excessive profits of electricity generators in Hungary,[41] a uranium license revoked on environmental grounds in Mongolia (see box 1 on page 14), and Eastern European countries' efforts to bring their electricity sectors in line with EU law so that they could join the Union.[42] The alleged "post-Cold War miracle"[43] – a purported perfect match between the rich energy resources in the former Soviet Union and Western technology and capital – had turned into a legal nightmare for the East.

The ECT certainly aimed at the former Soviet countries in the first place.

Lawyers of investment arbitration law firm Norton Rose Fulbright[44]

Just five years later, however, the ECT dock looked dramatically different as the treaty began to be used against Western European states too. Indeed, 64 per cent of the investor claims filed between 2013 and 2017 were against countries in Western Europe.[45] By the end of 2017 Spain was spearheading the list of countries which had been sued most often under the treaty.[46] A staggering total of 40 ECT claims worth multiple billions of euros against Spain are known of. Next in line is Italy which has faced at least ten challenges. Both countries have been or are being sued for having cut back support to renewable energy (see box 6 on page 46 for the dirty secrets of these claims). On the occasion of the first known ECT lawsuit against a Western European country – Vattenfall's 2009 challenge against Germany (see box 3) – one lawyer described the treaty as "a legal monster" which was "designed to protect European investments abroad" and had "come back to bite Europe".[47] Up till now the ECT is the only effective investment treaty which Western European states have signed with states that are capital exporters to them, allowing investors from these countries to bypass domestic courts and file expensive claims in private arbitration tribunals (the EU-Canada trade deal CETA will be the next).

Investment treaties were designed to protect European investments abroad. But now they've come back to bite Europe.

Investment arbitration lawyer Mahnaz Malik[48]

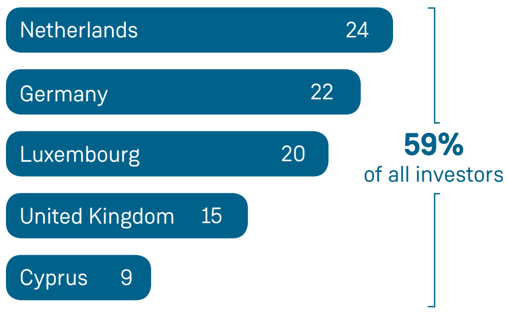
Western European companies cashing in

Independently of whether ECT lawsuits hit the West or the East, the most litigious companies have come from Western Europe, in particular the Netherlands, Germany, Luxembourg, and the UK. Companies and individuals registered in these four countries or in the tax haven Cyprus make up 60 per cent of the 150 investors involved in known claims by the end of 2017.[49] Many of them are mere mailbox companies, ie firms with hardly any employees in those countries but used by large corporations to shift profits and avoid paying taxes.

By the end of 2017 a large chunk of known ECT cases – 59 per cent – remained undecided. But the majority of resolved lawsuits have turned out to be rather beneficial for the companies involved: in 61 per

Image 3
Legal onslaught from Western Europe

Investors from these five countries have launched the highest number of ECT claims



Box 3
Big coal intimidates local government to lower environmental protection: Vattenfall v. Germany I

In 2009 Swedish energy multinational Vattenfall sued Germany, seeking €1.4 billion in damages over environmental standards imposed on a coal-fired power plant near the city of Hamburg. The company argued that conditions which local authorities had set for issuing a water use permit made the plant "uneconomical".[50] The case was settled in 2011 after the city Government agreed to relax the environmental requirements in parallel proceedings at a local court.

The case is significant because it shows how the ECT...

It's really unprecedented how we are being pilloried just for implementing German and EU laws.

Michael Müller, then Parliamentary State Secretary, German Ministry for the Environment[51]

Vattenfall had no interest in getting compensation. Vattenfall wanted to get rid of the environmental restrictions.

Professor Markus Krajewski, University of Erlangen-Nürnberg[53]

... can reduce environmental protections: As a result of the settlement the local authorities considerably watered down the initial environmental restrictions from the 2008 water permit for the power plant. The revised 2010 permit allows Vattenfall to draw more cooling water from the Elbe River and lowers the requirements for monitoring the coal plant's effects on fish stocks.[52]

... is used to intimidate politicians: Officials have indicated that the €1.4 billion ECT claim pressured the Hamburg Government into settling proceedings at the High Administrative Court, which Vattenfall had launched in parallel. This settlement at the local court lowered the environmental standards and became the core of the subsequent ECT settlement. As an official of the local authority for urban development and environment told reporters: "We accepted negotiations because we wanted to get this over with, without getting a tribunal ruling and having to pay €1.4 billion in compensation.... Of course, we made certain concessions to Vattenfall."[54]

... creates absurd conflicts with EU law: In 2017 the European Court of Justice ruled that Germany breached EU environmental law when it authorised Vattenfall's plant.[55] To comply with the ruling the authorities have ordered Vattenfall to temporarily abstain from drawing any cooling water from the Elbe. They might now have to undertake another impact assessment for the project. Legal experts have warned that if this new assessment requires tighter environmental restrictions, this could result in another Vattenfall claim against Germany which "may act as a significant financial incentive not to comply with EU law". Or could lead to the absurd situation where Germany might have to pay billions in compensation – because it complied with EU environmental law.[56]

cent of cases the tribunal ruled in favour of the investor or the case was settled. As with Vattenfall's coal case against Germany (see box 3), settlements tend to involve some concession to the investor in the form of a payment, relaxed regulations etc, even though the lack of transparency in ECT cases means details hardly ever become public.

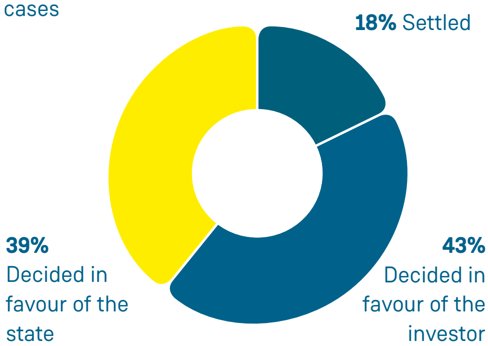
An explosion of cases

The number of ECT lawsuits is on a remarkable growth spurt. During the first 10 years after the ECT's entry into force in 1998 a mere 19 claims were registered in total. Compare that to the 75 ECT-based investor lawsuits filed during the last five years alone (2013-2017).[58]

Today no other trade and investment agreement has triggered more investor-state lawsuits than the ECT. By the end of 2017 a total of 112 ECT investor lawsuits were known about publicly.[59] They are the basis for the statistics in this report. By early June 2018, when the report went to press, the number had climbed to 114 cases listed on the website of the ECT Secretariat.[60] But as the disputing parties can agree to keep certain proceedings secret, not even the Secretariat is aware of all the claims – a fact which it often complains about.[61] Given this opacity the actual number of ECT claims could be much higher.

Image 4
Favourable outcomes for investors[57]

Investors won or achieved a settlement in 61 per cent of the concluded ECT cases



After a somewhat 'slow start' for the investment protection regime of the ECT, investors have now started to discover the treaty.... With increasing investor awareness of the treaty, we will probably see a continued steady stream of cases during the coming years.

Investment lawyer and arbitrator Kaj Hobér in 2010[62]

Image 5
A deluge of ECT disputes

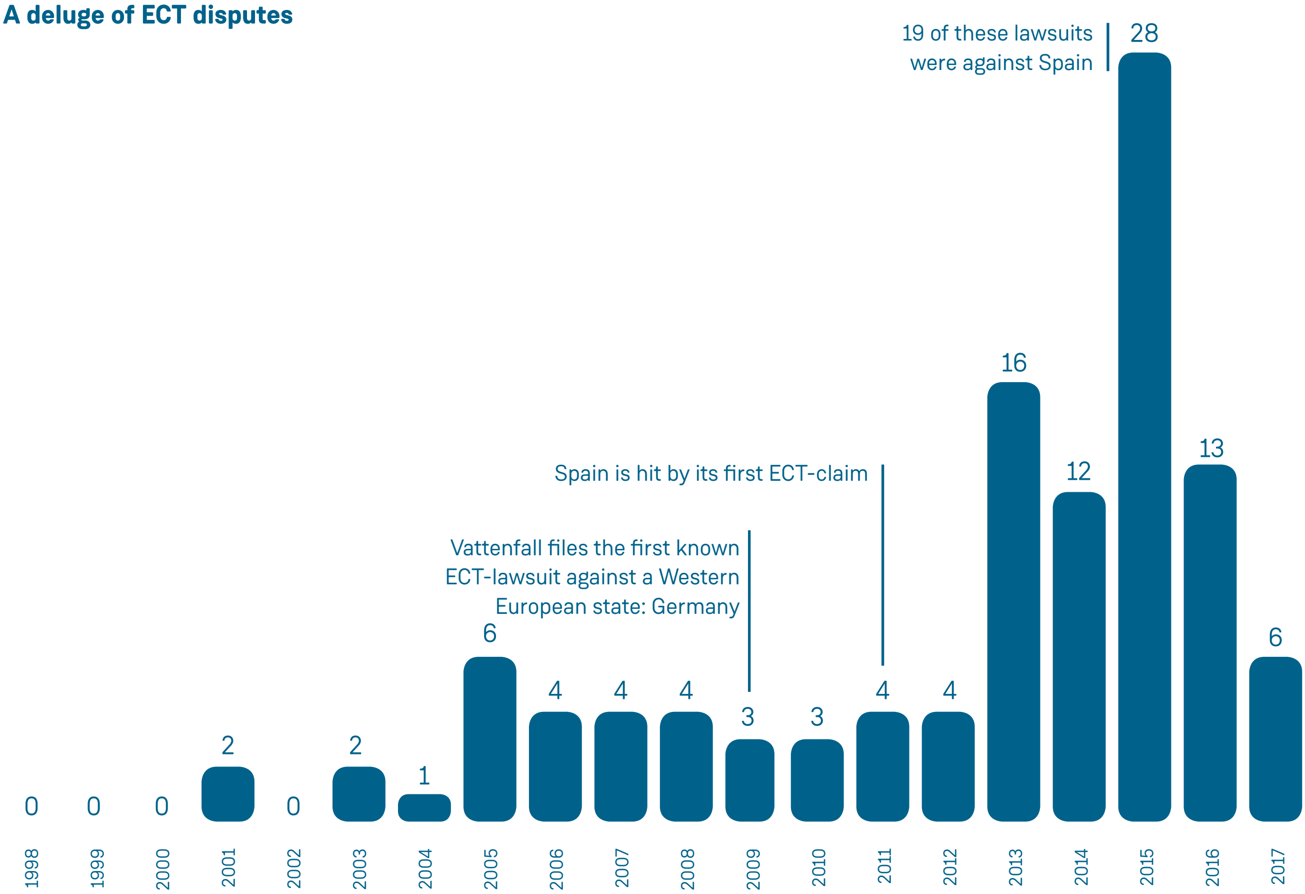
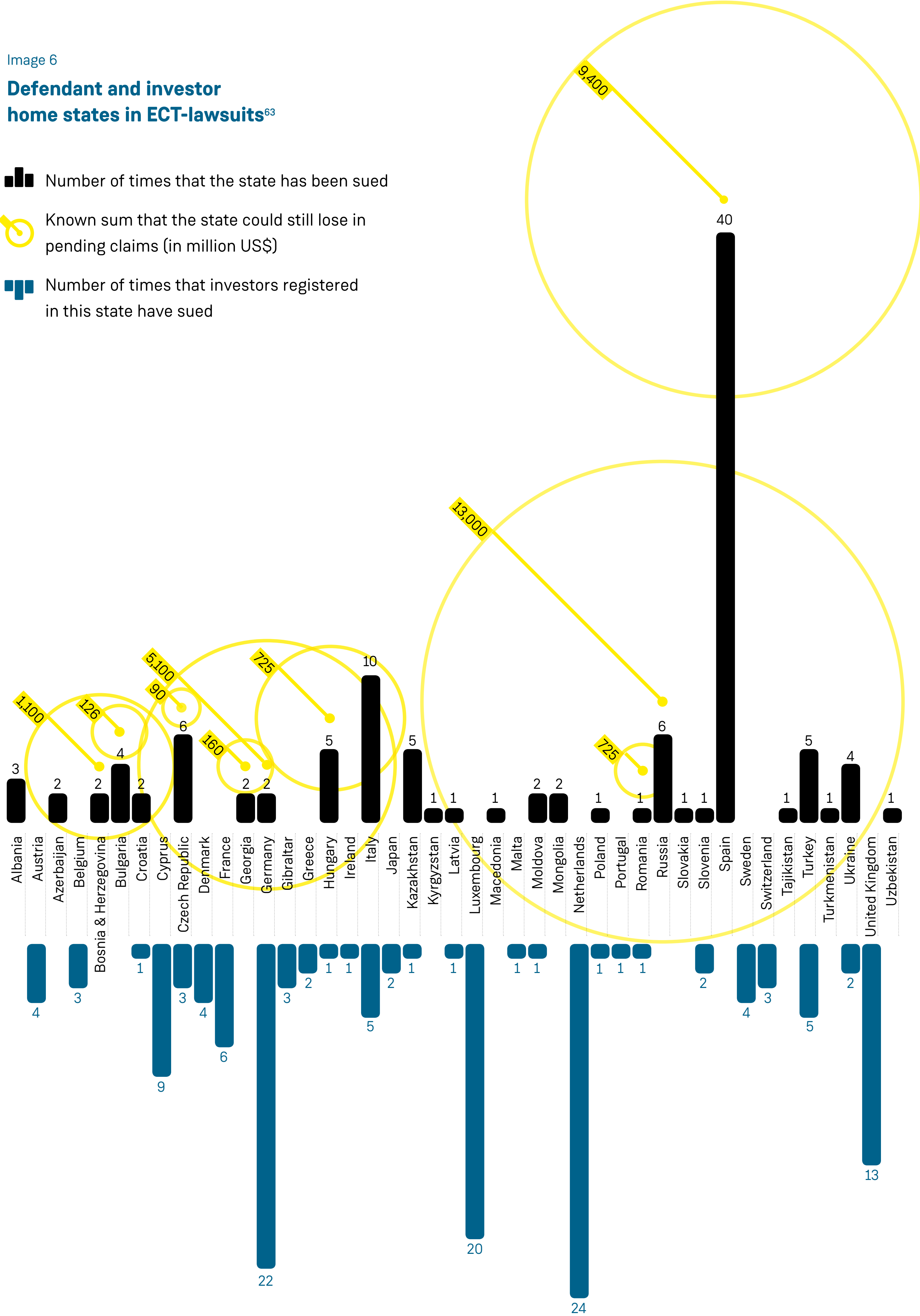


Image 6

Defendant and investor home states in ECT-lawsuits[63]



The world's largest investment treaty

The ECT's massive geographical reach is one reason why it has triggered more legal challenges than any other investment treaty. It applies to 48 countries[65] in Western and Eastern Europe, Central Asia, and Japan, plus the EU and Euratom (European Atomic Energy Community, with the same member states as the EU). Four more countries (Australia, Russia, Norway, and Belarus) have signed, but never ratified the ECT (although Belarus applies it provisionally). As *Global Arbitration Review* magazine put it: "The number of citizens the treaty covers who expect to wake up tomorrow morning, put on a kettle or switch on a light, is vast."[66]

To date the ECT is also the only investment treaty under which the EU as a whole could be sued. This is worrying because of the EU's leading (though still insufficient) role in renewable energy policy. If these policies became the target of investor lawsuits under the ECT, this could deter EU policy-makers from more ambitious climate action (see chapter 5). Investment lawyers have indeed argued that the EU's "direct or indirect actions… through the promulgation of directives or decisions of the European Commission, have the potential to harm energy investments and may therefore violate the standards of protection promised to foreign investors in the Energy Charter Treaty".[67]

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

United Nations Conference on Trade and Development (UNCTAD)[64]

Someone could also bring a claim against the EU as a whole.

Graham Coop, former chief lawyer of the ECT Secretariat and now with law firm Volterra Fietta[68]

Box 4
Bonanza for lawyers and investors! Multi-billion dollar payouts in the Yukos v. Russia cases

In 2014 the arbitrators in three related ECT claims (commonly referred to as the Yukos cases) ordered Russia to pay a whopping US$50 billion in compensation to former shareholders of now defunct oil giant Yukos.[69] The tribunal held that measures by the Russian Government which had led to the dismantling of Yukos in 2006/07 amounted to an illegal indirect expropriation. The ruling was annulled by a Dutch court in 2016, which found that the arbitrators had lacked jurisdiction.[70] This decision is currently under appeal while a second wave of Yukos claims is ongoing (by the company's former management).

The case is remarkable because…

… of the colossal amount of money at stake: The US$50 billion order against Russia – roughly equivalent to the GDP of Slovenia[71] – is the largest award in the history of investment arbitration. The total legal costs related to the case – US$124 million, out of which Russia was ordered to pay nearly US$103 million – are as remarkable.[72] Yukos' lawyers (from Shearman and Sterling, subsequently named "the $1,065 per hour lawyers" by the media[73]) alone billed over US$81 million for legal representation and assistance. Together, the tribunal's

How could the tribunal's assistant walk away with US$1 million? How much do ordinary people have to work to make that much money?

Arbitration specialist[75]

three arbitrators put over €5.3 million into their own pockets; their assistant walked away with nearly €1 million – about 10 times the annual salary of a judicial clerk for a US Supreme Court Judge.[74]

… Russia lost despite never having ratified the ECT: Russia signed the ECT in 1994, but the Russian Duma never ratified it. Still, the arbitrators accepted the claim, arguing that the ECT applied provisionally to Russia from the date of its signature (until its subsequent withdrawal). While the Dutch court later scrapped this reasoning (arguing that the ECT's dispute resolution provisions were at odds with the Russian Constitution and therefore not part of the provisional application), this decision does not bind future tribunals. Some have already ignored it and – again – accepted jurisdiction over ECT disputes against Russia.[76]

When we started the arbitration, everybody told us we were nuts… we were trying to sue Russia under a treaty that Russia had not ratified.

Yas Banifatemi of law firm Shearman & Sterling, who represented the Yukos shareholders[77]

… of the abuse by shell companies: It is notable how easily the tribunal accepted the Yukos shareholders as non-Russian foreign investors that could sue Russia under the ECT. The arbitrators had "some sympathy" for Russia's claim that the investors were mere shell companies, owned and controlled by Russian oligarchs and hence not foreign investors.[78] But they refused to lift the corporate veil of the companies, considering it enough that they were incorporated elsewhere (ie in Cyprus and the UK). In the words of one investment lawyer: "The Energy Charter Treaty – which was designed to protect the interests of foreign investors in host states – was in fact used to protect interests of national investors against their own state."[79]

… the ECT's inconsistency with the rule of law, which rests on the idea of equal treatment – that every individual, regardless of wealth and power, has an equal right to bring a case to court. The ECT however creates a parallel justice system which is exclusively available in practise to certain wealthy investors. This creates the absurd situation where in a repressive regime like Russia, rich tycoons have an extra track for legal redress not available to say, victims of torture or other human rights violations. Rather than advancing the rule of law, this unequal treatment can undermine it even further, for example, by reducing incentives to improve host states' laws and court systems (see also box 11 on page 72 on the myth that the ECT advances the rule of law).[80]

To protect and uphold the rule of law, our ideals of fairness and justice must apply in all situations and equally to everyone. ISDS, in contrast, is a system built on differential access.

Letter by US university professors and judges[81]

Billions pouring from public budgets

Information on how much money states have been ordered or agreed to pay in ECT lawsuits is available in 70 per cent of the cases. Based on this limited data, it appears that states have been ordered or agreed to pay over US$51.2 billion in damages to corporations.[82] This heady figure is roughly the equivalent of the annual investment needed to provide access to electricity for everyone in the world who currently lacks it.[83] However, this number is significantly distorted by the blockbuster US$50 billion compensation award in the three claims against Russia (known as the Yukos cases, see box 4). Without the Yukos claims, the 14 remaining cases where it is known how much financial compensation investors received amount to US$1.2 billion in damages – still a considerable sum, enough to connect 20 million households to the electricity grid in a country like India.

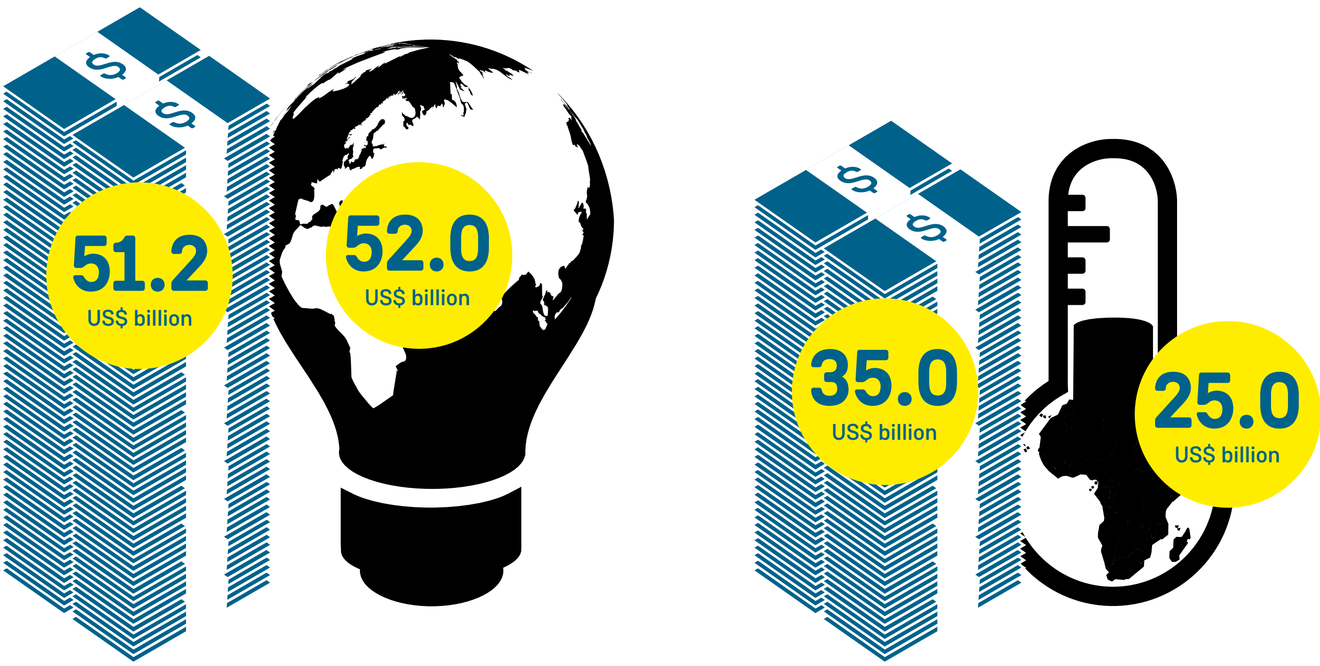
Add to this the fact that ECT cases pending at the end of 2017 – ie claims which could still be won – have a collective monetary value of US$35 billion.[85] That is far more than the estimated annual amount of money needed for Africa to adapt to climate change (US$20-30 billion).[86] The staggering price tags of ECT lawsuits show the potentially disastrous impacts they can have on public budgets – and how they can make rich corporations, including polluting ones, even richer.

This is the public's money at stake.... The person paying for it isn't big business... or anyone who could afford it, no it's the poor man in the streets.

Arbitration lawyer[84]

Image 7

The billions at stake in ECT investor-state disputes



Total amount of money governments have been ordered or agreed to pay in damages

Annual investment needed to provide access to energy for everyone who lacks it globally

Combined value of ongoing ECT cases (which could be won or lost) at the end of 2017

Estimated annual amount of money needed for Africa to adapt to climate change

Table 1
Plundering public coffers: the costs of known ECT awards or settlements[87]

Country	Known financial liability in ECT cases (US$)[88]	Unhealthy financial implications at the time of the award[89]
Russia	50 billion	20 per cent of Russia's total annual state budget[90] or the equivalent of the public health spending for 67,358,211 people, nearly half of Russia's population
Kazakhstan	520 million	Public health spending for 1,057,125 people
Spain	205 million	Public health spending for 87,090 people
Albania	136 million	Public health spending for 431,883 people
Hungary	133 million	Public health spending for 132,075 people
Mongolia	80 million	Public health spending for 524,590 people
Moldova	45 million	Public education spending for 291,667 people [91]
Slovenia	22 million	Public health spending for 12,418 people
Ukraine	16 million	Public health spending for 71,652 people
Georgia	15 million	Public health spending for 57,143 people
Latvia	3 million	Public health spending for 7,450 people
Kyrgyztan	1 million	Public health spending for 27,701 people

Billion dollar claims over hypothetical future profits

By the end of 2017 a total of 16 ECT suits in which companies had demanded US$1 billion or more in damages had come to light (see table 2 on page 43). One reason why ECT claims can run into billions is that corporations sue not only to recover money they have already spent, they can also claim compensation for hypothetical profits lost due to government actions. In its ECT challenge against Italy for example, oil company Rockhopper wants compensation for the money which it actually spent on exploring an oil field in the Adriatic Sea (US$40-50 million) and an additional US$200 to $300 million it claims it could have made drilling there had the Italian Parliament not banned new offshore oil drilling projects (see box 12 on page 81).

According to specialised arbitration lawyers it is common for arbitrators deciding ECT cases to "account for the present financial value of future cash flows" which an investment might have generated.[93] This makes the ECT a true cash machine for corporations – and a dangerous weapon in the hands of the fossil fuel industry, which already owns more oil, gas and coal reserves than climate scientists say is safe to burn.[94] If states force the industry to keep these fossil fuels in the ground, they will be liable for extraordinarily expensive compensation claims over lost future profits.

We've initiated arbitration proceedings to claim… at least all of the costs spent… which is in the region of 40 to 50 million dollars, but ideally (also) the profits, that we would have made had we been able to develop the field…. The lost profits might easily add up to 200 or 300 million dollars.

Sam Moody, Chief Executive Officer of Rockhopper on its ECT claim against Italy[92]

Stuck with vast legal bills

Even before an award is rendered or a settlement is reached, ECT investment arbitrations are expensive. Both the state and the investor have to pay for the administration of a case. They also have to pay arbitrators, witnesses, and experts who are often scattered across the globe and require translation services, travel, and living allowances. And they have to pay their lawyers.

On average states pay US$4.9 million per case on legal costs in investment disputes, but the bills can be much higher.[95] Moreover even if they win the case, legal costs are not always awarded to the victor. According to the ECT Secretariat, tribunals "usually" require the parties to share the administrative costs and the winning party to also pay part of the legal expenses.[96] This means that even when corporations lose ECT lawsuits, taxpayers might still have to pay millions in legal fees.

Take the US$10 billion case of Libananco against Turkey, for example. This was one of a multitude of unsuccessful claims by members and associates of the wealthy Turkish Uzan family, some of which related to fraud allegations against them by Turkey. Turkey's fees to defend the case totalled US$35.7 million. But while the lawsuit was dismissed in 2011, Turkey was only awarded US$15 million of its legal fees. At a time of severe economic recession and a staggering public deficit, the country had to pay out the remaining US$20.7 million to its lawyers.[98]

For any country, but especially for poorer ones, this is a significant burden on public finances. Even if the government wins the case, tribunals have mostly refrained from ordering the claimant investor to pay the respondent's costs.

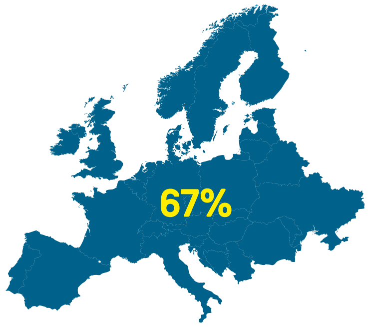
United Nations Conference on Trade and Development (UNCTAD)[97]

Europe's ECT hypocrisy

A remarkably large share of ECT-based investor lawsuits (67 per cent of cases known of up to the end of 2017) have been within the EU, ie brought by a European member state-based investor against a different EU member state.[99] In fact nearly half (45 per cent)[100] of all known so called intra-EU investment disputes were launched under the ECT (the rest were via bilateral treaties). The 56 intra-EU ECT claims pending at the end of 2017 constitute 19 per cent of all known ongoing investor claims worldwide.[101] Investors seem well aware that the ECT grants them greater privileges than EU internal market rules do, and that they can use it to access vast amounts of taxpayers' money which would otherwise not be available to them.

The avalanche of costly ECT-lawsuits within the EU reveals deep contradictions in the attitude of European institutions to the treaty. The European Commission has repeatedly intervened in proceedings by urging tribunals not to accept the claims (so far, to no avail).[103] At the same time the EU is pushing to expand the ECT to new signatory states in Africa, Asia, and Latin America (see chapter 4). It seems the EU wants to sharpen the ECT as a weapon, which gives even more power to EU companies that go abroad, while trying to limit the damaging effects on its own member states.

Image 8
When EU investors use the ECT to sue EU member states



... of all ECT claims are intra-EU

... of all known intra-EU investor disputes were filed under the ECT

The Energy Charter Treaty (ECT) is by far the most often invoked investment treaty in intra-EU relations.

Lawyer from law firm Stibbe[102]

Legal sword raised over the ECT?

However another EU institution might yet put the ECT into serious trouble. In March 2018 the EU's highest court, the European Court of Justice, ruled that the ISDS rules of some 200 bilateral investment agreements between EU member states violate EU law. The main argument was that according to the treaties, European law issues must be decided by European courts, while arbitration tribunals hearing cases that touch upon EU law actually sideline those courts.[104]

This is a monumental decision from the court because it addresses the fundamental problem of how ISDS undermines domestic legal systems.

Layla Hughes, Center for International Environmental Law (CIEL)[105]

While the ruling does not mention the ECT, it could still have serious implications for the treaty. For example one could argue that the ECT's arbitration rules, too, sideline EU courts in matters of EU law[106] and therefore have to be abolished or at least significantly altered.[107] It remains to be seen how, or whether, this ruling will impact the ECT or arbitrations under the agreement.

Italy and Russia exit, pursued by the ECT zombie

Another development has sent shock waves through the ECT community, in particular the law firms which make a lot of money from investor lawsuits; having been hit by costly claims, both Russia and Italy turned their back on the treaty. In 2009 in the midst of the giant Yukos arbitrations (see box 4 on page 25), Russia terminated its provisional application of the ECT (which it had signed, but never ratified). In December 2014 Italy withdrew from the agreement.

The real danger is in the snowballing effect as other ECT Contracting Parties may follow in Italy's steps.

Investment arbitration law firm Mena Chambers on Italy's ECT withdrawal[108]

While Italy officially justified its decision by citing the need to cut administrative expenses in times of austerity,[109] there is speculation that its real motive was the fact it faced its first ECT lawsuit in 2014, with more threatened. The Italian Government was also planning a number of new energy projects including controversial gas pipelines and solar panels, which it apparently wanted to shield from future investor challenges.[110]

However thanks to the ECT's infamous 'zombie clause' Italy and Russia can both still be challenged for another 20 years over investments in place when the halting of their ECT memberships took effect – ie until October 2029 for Russia and January 2036 for Italy. Indeed, arbitrators have already accepted new ECT lawsuits against both countries (see boxes 4 and 12 on pages 25 and 81).

Opposition to the ECT

The sheer number and cost of corporate ECT lawsuits is slowly generating opposition and criticism. Some public interest groups are calling for the termination of the ECT or for abolition of its investor arbitration rules, and on governments to not pay out multi-million ECT awards.[111] But so far, the ECT has largely escaped the global storm of opposition which has hit investor-state dispute settlement in the past decade, for example, in the context of the now-stalled EU-US trade deal TTIP (Transatlantic Trade and Investment Partnership).

Across the world public interest groups, trade unions, and academics have called on governments to oppose investor-state arbitration of the type included in the ECT. They say it fails basic standards of judicial independence and fairness and threatens states' responsibility to act in the interest of their citizens and the planet. They have been joined by judges who have also sounded alarm over the exclusive rights and pseudo-courts for foreign investors. Germany's largest association of judges and public prosecutors, for example, has called on legislators to "significantly curb recourse to arbitration in the context of the protection of international investors."[112]

Investors should not be able to attack sovereign democratic decisions through arbitration procedures.

Bernd Lange, chair of the Committee on International Trade in the European Parliament[113]

Some parliaments and governments have also realised the injustices of investment arbitration and are trying to get out of it. Several countries have terminated their bilateral investment treaties; examples include South Africa, Bolivia, India, and Indonesia.[114] South Africa has developed a domestic bill that does away with some of the most dangerous clauses in international investment law and refers disputes to local courts, moving away from investment arbitration more generally.[115]

The next frontier?

At a time when the number of super-sized ECT claims is surging, and more and more governments are beginning to exit from investor-state arbitration more generally, an even bigger threat looms on the horizon: the massive expansion of the ECT into Africa, the Middle East, Asia, and Latin America (see chapter 4).

This process, which ultimately aims to make the ECT into a de facto World Trade Organisation (WTO) for the energy sector, is mainly driven by the ECT Secretariat, the EU, some key member states and those who profit when investors sue states under the ECT: large energy corporations and specialised investment lawyers. We take a closer look at these ECT profiteers in the next chapter.

References chapter 2

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114 UNCTAD (2017) World Investment Report 2017. Investment and the Digital Economy, http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf, 143.

115 See for South Africa, and other reform approaches to international investment law in Africa: Thomas Kendra (2018) Intra-African investment treaties: in search of a new balance, Global Arbitration Review, 14 February, https://globalarbitrationreview.com/article/1153206/intra-african-investment-treaties-in-search-of-a-new-balance?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=9172487_GAR%20Headlines%2014%2F02%2F2018&dm_i=1KSF,5GLJB,9GPLBB,L5NAC,1.

Chapter 3

Welcome to the 'family': the Energy Charter Treaty profiteers

What do you think of when you hear the word 'family'? Whatever makes a family for you, the word is intended to evoke ideals of mutual love and care, which is why those who benefit from the Energy Charter Treaty (ECT) like to use a family image to promote it. But the ECT family is no loving home. It's a place of corporate power and greed, of conflicts of interest and abuse. And some family members profit handsomely when investors sue governments.

At the end, there's always a "family photo".[1] Whether at the annual Energy Charter Conference, a training workshop or a public event on the ECT, there's often a photo shooting with what the Secretariat likes to call the "Energy Charter Family". New signatory states are welcomed to this "family" with open arms.[2]

Let us get to know this peculiar family.

Our multinational family is clearly growing.

Urban Rusnák, Secretary General of the Energy Charter Secretariat[3]

3.1 The not-so-neutral Secretariat

The Brussels-based Secretariat of the Energy Charter was set up in the mid-90s, has around 20 permanent staff and is funded by the ECT's member states.[4] Its long list of responsibilities range from "promoting accession to the ECT" and facilitating discussions about reforming the treaty to "providing neutral, independent legal advice and assistance in dispute resolution" such as "negotiation support" for reaching settlements.[5] But the Secretariat is less neutral than this sounds. Rather it appears to act like an assistant to the corporations and lawyers who profit handsomely from the ECT.

Putting polluters in the driving seat

The Secretariat has close links with energy companies and for-profit lawyers who make money when investors sue states under the ECT. This is strikingly illustrated by the advisory bodies which the Secretariat has set up: the Industry Advisory Panel and the Legal Advisory Task Force.

The Energy Charter attaches great importance to its relationship with the energy industry.

André Mernier, Secretary General of the Energy Charter Secretariat, 2006-2011[6]

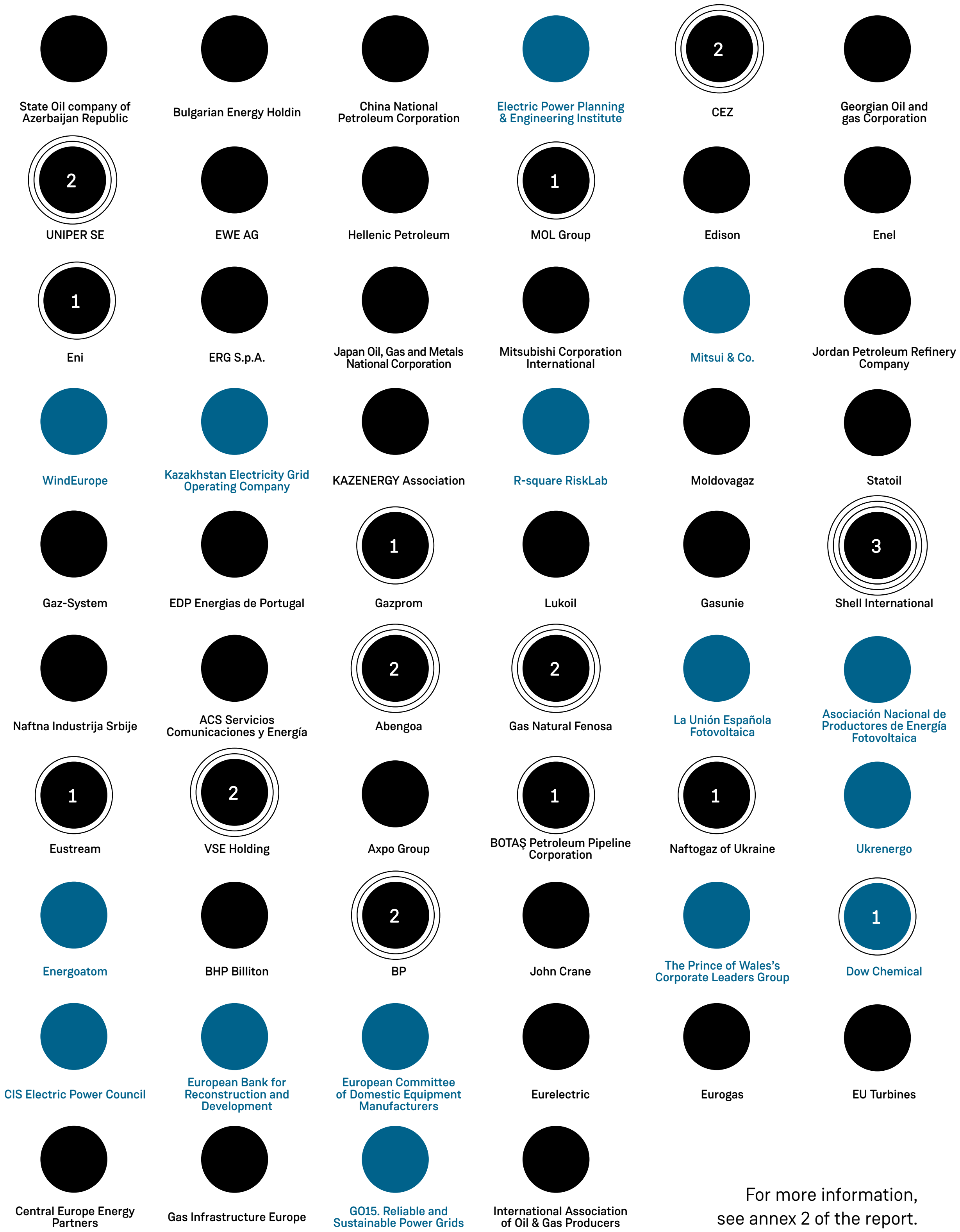
Image 9

Members of the ECT Industry Advisory Panel

make money with fossil fuels (or their members)

not part of fossil fuel industry

number of investor-state lawsuits via the ECT or other agreements



For more information, see annex 2 of the report.

The Industry Advisory Panel bands together representatives of energy companies and associations who provide "policy advice" on the "main directions of the Energy Charter Process".[7] Its members have an appalling track record of driving climate change: of the 42 companies which were on the panel in November 2017, at least 36 make money from fossil fuels,[8] the burning of which is one of the main causes of global warming. This includes some of the world's richest oil, gas, and coal corporations such as China National Petroleum Corporation, Shell, BP, Lukoil, Hellenic Petroleum, Gazprom, ENI, and BHP Billiton.

Other members of the Industry Advisory Panel represent energy distributers, funders, and companies that simply consume an awful lot of energy for their production. Howard Chase, the Chair, boasted to a reporter in 2012 that his employer, then the world's second largest chemical company Dow, "uses 800,000 barrels of oil equivalents per day, equal to one per cent of global oil production!".[9] According to a 2017 analysis of large chemical corporations, Dow emitted 35.4 million tonnes of CO2 in 2016 – more than over 130 countries emitted that same year, including New Zealand, Luxembourg, and the Baltic states.[10]

The Industry Advisory Panel was set up… to strengthen the dialogue with the private sector on the main directions of the Charter Process.

Energy Charter Industry Advisory Panel[11]

The ISDS fox in the henhouse

Several corporations on the advisory panel (or their parent companies or subsidiaries) – such as oil and gas multinationals Gazprom, Shell, ENI, Gas Natural Fenosa, Naftogaz, BP, and chemical giant Dow – have sued governments under investor-state dispute settlement (ISDS), including under the ECT.[12] Globally, corporations on the panel were involved in at least 22 investor lawsuits by the end of 2017.[13] Companies that have sued governments under the ECT include Hungarian oil and gas corporation MOL, Czech electricity behemoth ČEZ, and Spanish energy giant Abengoa.[14] The corporations on the panel are fervent supporters of the ECT's investor privileges and have lobbied for their inclusion in other agreements. For the proposed EU-US Transatlantic Trade and Investment Partnership (TTIP), for example, the Industry Advisory Panel demanded "widely applicable" investor rights, with very narrow public policy exemptions,[15] including for government action to halt disastrous climate change.

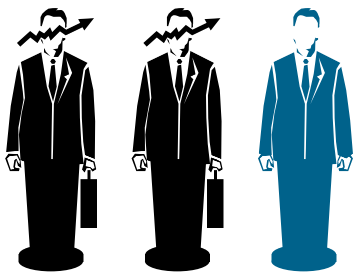
I think the Secretariat is proud of having so many ISDS cases. They would like to have more transparency in the cases, but I never got the impression that they are worried about the massive caseload.

Nathalie Bernasconi-Osterwalder, Institute for International Sustainable Development (IISD)[18]

Even more ISDS profiteers sit on another Energy Charter advisory body, the Legal Advisory Task Force which unites around 80 lawyers.[16] Two thirds of them represent companies and institutions with financial stakes in investment arbitration, such as multinationals that have filed ISDS claims (such as BP, Shell, Total, and Occidental), specialised arbitration law firms (including nearly all of the busiest law firms in ECT claims, see chapter 3.3), or institutions which administer the disputes.[17]

Image 10

Members of the ECT Legal Advisory Task Force



Two thirds of the lawyers have a financial stake in investment arbitration.

Vested advice

Despite their aggressive use of ISDS and horrendous carbon footprint, those on the ECT advisory bodies are given ample opportunities to influence the Secretariat, ECT member states, and the wider Charter process in their own interest. The companies on the Industry Advisory Panel for example, provide inputs to publications by the Secretariat[19] and act as speakers in the Secretariat's seminars and trainings.[20] According to its Chair the Industry Advisory Panel "allows the energy industry to directly share its views with the ECT member states which then can use these insights in the formulation of public policies".[21] In a leaflet promoting the panel, this "privileged access" is depicted as particularly useful for influencing policies on foreign investments in the energy sector.[22]

A glaring example of how corporate lawyers can use their first-rate access to the ECT Secretariat to drum up business for themselves is a handbook which the Secretariat published in 2017. Written by lawyers on the Legal Advisory Task Force, it advises governments on how to draft contracts for large energy projects with foreign investors.[23] Among other things the handbook contains a long list of model "stabilisation clauses" which can for example prohibit governments from increasing royalties for a project or exempt an investor from compliance with certain future laws. Stabilisation clauses are hugely controversial because they can limit governments' ability to act in the interest of sustainable development, human, and labour rights. But lawyers on the Legal Advisory Task Force are rather happy with them: they can earn handsome fees when stabilisation clauses trigger expensive investor lawsuits and therefore have a strong vested interest in governments including them in investment contracts.

Large arbitration law firms also provide instructors for ECT training courses by the Secretariat. In rooms packed with government officials, company representatives, and students, the lawyers are given a floor to praise the alleged benefits of the ECT and downplay its risks, while planting litigation ideas into corporate minds.[24] Rather conveniently, the participants from states and companies can then become the law firms' future clients, whether in ECT or other ISDS disputes.

This training was brilliantly designed to better understand the ECT, to really 'look inside' and know how, when and why to use it.

Representative of Georgian Oil and Gas Corporation about a training on the ECT's investor rights[25]

The Secretariat beats the ECT drum in the corporate world

At times the ECT Secretariat itself acts like a corporate law firm, such as when its staff advertises the investor privileges enshrined in the treaty to big business. In a January 2017 workshop, for example, the Secretariat's top lawyer explained to oil and gas companies when to "rely on the Treaty in contentious situations" and "how to use the Treaty from the outset to structure projects" so that states can potentially be challenged. The programme of the workshop ('A Deep Dive into the Energy Charter Treaty: Increase protection of your energy investment') promised participants: "Whether you are about to start new projects in the energy sector or are concerned your existing project structuring is not as effective as it could be, join our... masterclass to learn how to settle disputes and reduce your commercial risk when investing in the energy market."[26]

Similarly during a meeting in China in 2015, a member of the Secretariat explained to companies in the room how they could benefit from the ECT if China joined the treaty. Drawing on examples of arbitrations against Central Asian countries, he stressed "the potential of the Energy Charter Treaty in protecting Chinese and foreign investments" in the context of the Belt Road Initiative.[27] Under this name, China plans to spend close to a trillion dollars on infrastructure projects which will connect it to East Africa, the Mediterranean, Europe, Central Asia, and the Middle East.

The secretariat... makes the investment protection and arbitration provisions of the treaty known to the legal and business community.

Graham Coop of law firm Volterra Fietta, former General Counsel at the Secretariat (2004-11)[28]

Investment lawyers walking in and out of the Secretariat

That some members of the ECT Secretariat are actively promoting the treaty's litigation options amongst corporations might not be surprising considering their professional background. For example all but one of the Secretariat's chief legal officers so far have either been with arbitration law firms before they worked at the Secretariat, or joined one afterwards: Alejandro Carballo Leyda (General Counsel at the Secretariat since 2013) joined after nearly 13 years with Spanish law firm Cuatrecasas,[29] which is advising investors in numerous ECT-claims against Spain (see section 3.3); Graham Coop (General Counsel 2004-2011) joined after 10 years with Freshfields and is now promoting the ECT at arbitration boutique Volterra Fietta;[30] and Adnan Amkhan (Head of Legal Affairs at the Secretariat 2000-2004) is now leading the ECT work at Mena Chambers law firm.[31]

The revolving door between the Secretariat and the arbitration industry appears to be in full swing. This breeds conflicts of interests by inviting the Secretariat's staff to use their positions for private gain, including for the benefit of future employers or former colleagues.[32] The institution's alleged "neutral, independent legal advice and assistance" doesn't appear so neutral after all.

3.2 Investors who have filed ECT lawsuits

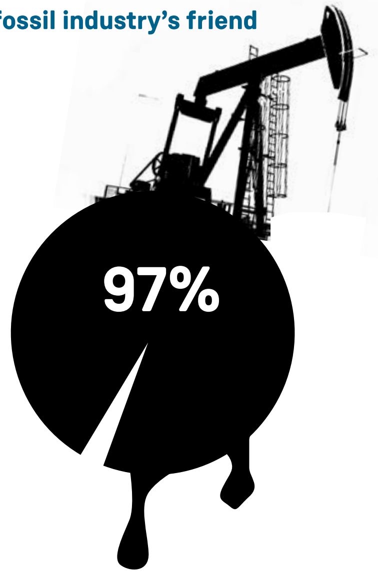
During the ECT's first 15 years investor lawsuits under the agreement related mostly to fossil fuels: 70 per cent of all ECT cases, which were known at the end of 2012, pertained to oil, gas, and coal.[33] This reflected global trends. As Lexpert, an online news portal about the business of law, noted in 2014: "If a single industrial sector might be called the cradle of international... arbitration, it would be the energy business. Especially oil and gas."[34] Yet ending the burning of fossil

In terms of energy sources, the ECT's primary point was to protect investments in conventional energy types (especially oil and gas).

Lawyer of law firm Allen & Overy[35]

Image 11

The fossil industry's friend



... share of investors who sued via the ECT by the end of 2012 and were fossil fuel companies or otherwise involved in dirty energy projects

fuels is the biggest challenge to preventing runaway climate change.

The remaining cases related mostly to nuclear energy (14 per cent) and large hydropower projects (8 per cent). The latter are also significant emitters of greenhouse gases like carbon dioxide and methane. In some cases, emissions from large damns and water reservoirs can even exceed those that would have been produced from burning fossil fuels instead.[36] Looking at the entire portfolios of the investors who had filed ECT lawsuits by the end of 2012, a stunning 97 per cent were either fossil fuel companies or otherwise involved in dirty energy projects.[37]

Billion dollar lawsuits by polluters & the super-rich

Fossil fuel and other polluting companies dominate the list of 16 known ECT lawsuits in which investors demanded US$1 billion or more in damages (see table 2). All but one of these mega-suits involve very large corporations or super-wealthy individuals and investment funds. This reflects a wider trend in investment arbitration. A study from 2016 which analysed over 250 ISDS awards globally found that their main beneficiaries have been "large or extra-large companies and very wealthy individuals (aka tycoons)":[38] 94.5 per cent of the compensation went to companies with at least US$1 billion in annual revenue – and especially extra-large transnationals with more than US$10 billion – or to individuals with over US$100 million in net wealth.[39]

The ECT goes renewable

While the ECT started off as what one journalist once called "the oil industry's nodding acquaintance",[40] most recent lawsuits under the treaty pertain to renewable energy sources like solar and wind. It is worth noting by way of context that this reflects the current situation in which renewables are getting cheaper and governments are removing subsidy schemes or being lobbied to remove them by traditional, competing energy sectors. This has led to a rash of investor lawsuits. Meanwhile few governments have made the kind of big changes in the world of dirty energy that effective climate action requires (see chapter 5), which is reflected in a lower proportion of current lawsuits. More than two thirds of the ECT cases filed between 2013 and 2017 (53 out of 75), challenge government decisions in the renewable energy sector.[41] Due to this wave of claims, 50 per cent of the total 112 ECT investor lawsuits known about at the end of 2017 are now over renewables.[42]

After 15+ years of reporting on... ISDS cases more generally, I am certainly of the view that – whatever one thinks of ISDS – this is not a system that is much used by genuinely small claimants to obtain justice.

Luke Eric Peterson, journalist and publisher of *Investment Arbitration Reporter* news service[43]

In countries such as Spain, Italy, and the Czech Republic, regulators initially used strong incentives to boost investments into solar panels and wind turbines, including premium prices for renewably generated electricity. When the response and costs for the support schemes exceeded expectations, governments scaled back the incentives,

Table 2
Known billion-dollar lawsuits under the ECT[44]

ECT case	Energy sector	Type of investor[45]	Money claimed (US$)
Hulley Enterprises v. Russia	Oil	Six Russian oligarchs	93 billion
Veteran Petroleum v. Russia	Oil	Six Russian oligarchs	16 billion
Yukos Capital v. Russia	Oil	Six Russian oligarchs	13 billion
Libananco v. Turkey	Hydropower	Affiliate of one of Turkey's once richest families (Uzan)	10 billion
Vattenfall v. Germany (II)	Nuclear	One of Europe's largest utility companies	5.1 billion
Littop v. Ukraine	Oil & gas	Affiliated with Ukrainian billionaire Igor Kolomoisky	5 billion
Yukos Universal v. Russia	Oil	Six Russian oligarchs	4.6 billion
Cementownia v. Turkey (I)	Hydropower	Affiliate of one of Turkey's once richest families (Uzan)	4.6 billion
Europe Cement v. Turkey	Hydropower	Affiliate of one of Turkey's once richest families (Uzan)	3.8 billion
Cem Uzan v. Turkey	Hydropower	Turkish millionaire and member of one of Turkey's once richest families (Uzan)	3.5 billion
Ascom and Stati v. Kazakhstan	Oil (& gas)	Anatole Stati (who sued with his son and some of their firms) was Moldova's richest man when he filed the case	2.7 billion
PV Investors v. Spain	Solar	Together, the investors (which include Dutch mailbox firm of US-based Fortune 200 company AES) manage over US$30 billion on behalf of other funds and investors	2.6 billion
Vattenfall v. Germany (I)	Coal	One of Europe's largest utility companies	1.4 billion
AES v. Kazakhstan	Hydropower & coal	US-based Fortune 200 company	1.3 billion
CSP Equity Investment v. Spain	Solar	Luxemburg-registered subsidiary of Abengoa, one of Spain's richest companies when the case was filed	1.1 billion
EGS v. Bosnia and Herzegovina	Coal & thermal power	Unclear. Slovenian state owned firm without employees.[46]	1 billion

Box 5
Pitting parliament against nuclear profits – Vattenfall v. Germany II

The… case demonstrates the potential for claims arising out of a state's decision fundamentally to change its energy policy for environmental reasons.

Wendy Miles & Nicola Swan of law firm Debevoise & Plimpton[48]

Following its first ECT success (see box 3 on page 22), Vattenfall sued Germany again in 2012, seeking €4.3 billion plus interest for lost profits related to two of its nuclear power plants.[47] The legal action came after the German Parliament decided to speed up the phase-out of nuclear energy following the Fukushima disaster in 2011 and countrywide anti-nuclear protests. Amongst other things parliamentarians ordered the immediate and permanent shutdown of Germany's oldest reactors, including Vattenfall's Krümmel and Brunsbüttel plants. Due to several breakdowns, both had already been out of service for several years. The case is ongoing at the time of writing (June 2018).

The case is interesting because it shows how the ECT…

… puts a lot of taxpayers' money at stake: Vattenfall's €4.3 billion claim[49] – the equivalent of one quarter of Germany's entire 2017 health budget[50] – is one of the largest in the history of investor-state arbitration. By April 2018 the German Government had spent more than €15 million in legal and administrative costs to defend the case. Furthermore, Vattenfall has spent €26 million on its lawyers which it also claims from Germany.[51]

… leaves citizens in the dark: Experts have slammed the German Government for "intentionally leaving the German public out in dark" about the details of Vattenfall's claim.[52] Despite billions in taxpayers' money at stake, not a single case document has been publicly released. A small group of elected parliamentarians have access to Germany's arguments in the proceedings, but only in a high-security building and they are not allowed to reveal anything they see to anyone. While the Government did agree to livestream a 10-day hearing in October 2016, experts questioned the usefulness of that exercise: permanent recordings were only made available for two days while notes were not prepared at all (so people had to watch 8 hours per day for 10 successive days) and viewers had to follow the complex oral arguments without any of the written materials.[54]

Secrecy is a common problem with ISDS – but the Vattenfall dispute has taken the problem to new heights.

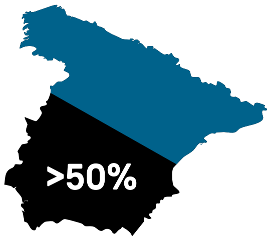
Nathalie Bernasconi-Osterwalder, Institute for International Sustainable Development (IISD)[46]

… creates VIP rights for foreign investors: Together with German energy giants E.ON and RWE, Vattenfall also sued Germany in its constitutional court. In 2016 the latter upheld the nuclear exit, but condemned the fact that its acceleration did not allow the companies to use formerly allocated electricity output allowances, ordering Germany to find a solution for this problem.[55] Even though Vattenfall obtained justice in German courts, it still continues its parallel ECT claim – possibly counting on a much larger amount of taxpayer money in compensation than would ever be available under German law. Germany's largest association of judges and public prosecutors has criticised parallel justice systems such as those found in the ECT, which are exclusively available to foreign investors, stating that "the creation of special courts for certain groups of litigants is the wrong way forward".[57]

Vattenfall does in no way question the decision to phase out nuclear power in Germany. But we insist on being compensated for the financial loss resulting from this decision.

Anne Gynnerstedt, General Counsel of Vattenfall[56] sometimes retroactively. These decisions were terrible for the energy transition and the climate. They meant financial disaster for many ordinary people who, attracted by the subsidies, had turned agricultural fields into solar fields, pooled family savings and taken mortgages to finance solar roofs. Many small and medium enterprises and municipalities were also badly affected by the subsidy cuts, particularly in rural areas. But this does not mean that the renewable claims are an argument in favour of the ECT; in fact these cases reveal some serious flaws of the ECT and investment arbitration more broadly.

Image 12
The dirty secrets of the 'renewable claims' against Spain



More than half of the 40 claims have been filed by investors with links to the coal, oil, gas, and nuclear industries.

Dirty energy and big finance profit

When we look a little closer at these cases we see that the ECT is hardly acting as the champion of small-scale and renewable enterprises. A prime example are the many cases that have challenged cuts to support for renewable energy in Spain. More than half of the known ECT-claims against the country (21 out of 40) involve investors with links to the gas, coal, oil, and nuclear industries.[58] Telling examples are German coal and nuclear veterans E.ON and RWE (the latter sues via subsidiary Innogy, now also a part of E.ON)[59] and investment funds RREEF and Masdar (both also invest into fossil fuels) (see box 6 on page 46 for more information on the Spanish cases).

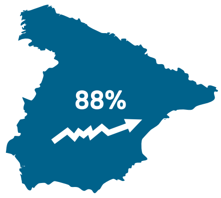
Financial institutions that have financed renewable energy investments also can benefit from investment treaty protections.

Lawyer of law firm Jones Day on "International Remedies for Foreign Investors in Europe's Renewable Energy Sector"[60]

In a staggering 88 per cent of the lawsuits against Spain, the claimant is not a renewable energy firm, but an equity fund or other type of financial investor.[61] In total, 53 per cent of all known ECT investor lawsuits known about up to the end of 2017 have been launched by financial investors, including portfolio investors (like insurance companies, pension and hedge funds) and holding companies, which invest in shares, bonds, intellectual property and other assets, but neither control a company effectively nor have any substantial economic activities abroad themselves.[62]

Image 13
ECT claims are dominated by financial investors

… of all known ECT lawsuits were filed by private equity funds or other types of financial investors.



… of the 40 lawsuits over cuts to support schemes for renewables in Spain were filed by financial investors, not renewable energy firms.

The ECT: a paradise for mailbox companies

Another worrying trend is abuse of the ECT by letterbox companies. These are firms registered in a country such as the Netherlands, where they have hardly any or even zero employees and no real economic activity. Letterbox firms are used by large corporations to shift profits and avoid paying taxes, but also to launder money and to sue states via as many different investment treaties as possible – an abusive practice known as "treaty shopping".[63] An extraordinary 23 out of the 24 supposedly 'Dutch' investors who filed ECT-lawsuits by the end of 2017 are such mailbox companies.[64] They include Khan Netherlands (used by Canadian mining company Khan Resources to sue Mongolia, see box 1 on page 14), Isolux Infrastructure Netherlands, and Charanne (which Spanish businessmen Luis Delso and José Gomis, two of the richest Spaniards, used to sue Spain).[65]

Box 6

How Spain might have to pay billions for imaginary corporate profits to renewables investors

Since 2011 Spain has been hit by 40 ECT lawsuits over cuts to renewable energy subsidies.[66] In the midst of a harsh financial crisis and succumbing to lobbying from large utilities such as Endesa, the conservative government had rolled back price guarantees for renewable energy producers, for which costs had surged. One claim has been discontinued and two dismissed,[67] but by April 2018 Spain had lost two cases and was ordered to pay €128 million to London-based private equity fund Eiser, and €53.3 million to Luxembourgish fund Novenergia.[68] In the 35 cases yet to be decided, investors are demanding over US$9.4 billion in compensation[69] – a mind-boggling sum almost equivalent to Spain's entire healthcare budget.[70] Similar cases have been filed against the Czech Republic, Italy, and Bulgaria.[71]

Some in the select group of investors that can access ISDS view it not only as an insurance policy, but also as an additional source of profit.

Kyla Tienhaara and Christian Downie, Australian National University[72]

The cases are interesting because they show how the ECT…

… can be abused by speculative funds trying to make windfall profits: In 88 per cent of the lawsuits, the claimant is a private equity fund or other type of financial investor.[73] Examples include Masdar (an Abu Dhabi Government-owned fund, which also finances oil and gas drilling)[74] and RREEF (part of DWS, a fund of German financial giant Deutsche Bank, which also invests in coal, gas, and airports).[75] Several of the funds only invested in Spain after 2008 and/or increased their investments in 2010/11 – ie when it was clear the country was already in full-blown crisis mode and some changes to the solar support schemes had already been made. Out of the 110 companies involved in the ECT claims, at least 63 invested after 2008 (sometimes just purchasing existing solar plants); at least 8 more later continued investing despite the changes.[76] Afterwards, these funds argued that their profit expectations were undermined by the change in government policy.

… can make taxpayers pay for corporations' imaginary future profits: The tribunal in the Eiser case ordered Spain to pay €128 million in compensation for "lost future cash flows".[77] These are imaginary profits that the fund might have earned with its solar power plants over an assumed 25-year-life in a hypothetical scenario without any subsidy cuts. The Spanish Supreme Court has rejected similar damages claims for extrapolated future profits as absolutely speculative.[78] But ECT tribunals regularly hand out public monies on the basis of such corporate pipe dreams. Who will foot the bill? Ordinary Spaniards who have already been hit by harsh austerity measures, some of whom are also struggling to repay loans which they borrowed to build once-promising solar roofs and fields. There is no compensation bonanza for them.

… could also be used to challenge subsidy cuts for climate-wrecking fossil fuels: In the Eiser case the tribunal found that Spain violated the ECT when it "radically altered" its support scheme for renewables.[79] According to the arbitrators Spain "crossed the line" and "violated the obligation to accord fair and equitable treatment … when the prior regulatory regime", which had attracted the Eiser fund, "was definitively replaced by an entirely new regime".[80] This reasoning could easily be applied if the current regulatory regime, which globally subsidises oil, coal, and gas energy in the trillions, was replaced by various governments by an "entirely new regime" which abolishes fossil fuel subsidies (see chapter 5).

ISDS gives a powerful tool for one or a few large fossil fuel companies to frustrate climate change action.

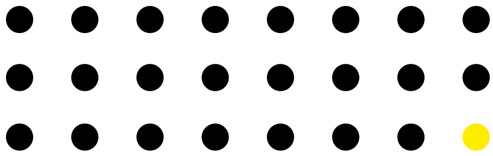
Professor Gus van Harten, Osgoode Hall Law School[81]

These cases are enabled by the ECT's overly broad definition of the term "investor". It basically says: any company registered in an ECT contracting state can sue any other ECT state where it owns energy-related assets; there is no need for this legal "home state" to be the company's actual base or location of its headquarters. This is how even US and Canadian corporations have sued via the ECT despite neither country being parties to the deal.[83] At a time of globalised supply chains and universal corporate subsidiary networks, the ECT's broad investor definition exposes states to unpredictable legal risk: once they sign up to the agreement, states can effectively be sued by investors from around the globe.

The ECT has been on the radar screen of "treaty shoppers" for some time.

Arbitration lawyer Paul M. Blyschak[82]

Image 14
ECT-abuse by mailbox companies



23 out of 24 ECT cases filed by alleged "Dutch" investors are from mere mailbox companies.

3.3 The legal industry

The boom in ECT disputes has also created bonanza profits for law firms, arbitrators, and a phalanx of speculators who make a lot of money from lawsuits against governments. They have built a multimillion-dollar industry whose interconnectedness and multiple financial interests raise serious concerns about their ability to act as fair and neutral intermediaries in ECT disputes.

Investment lawyers fuelling the ECT gold-rush

Specialised arbitration lawyers have been key drivers of the lawsuit boom under the ECT. The first known claim (registered in 2001 by a British subsidiary of US energy giant AES) was allegedly the idea of one lawyer. "Eventually, the proposal went to the client" and in one fell swoop "an Energy Charter Treaty claim was filed", he told a reporter.[84] This "pioneer" role has paid off for the law firm Allen & Overy (where this lawyer worked at the time), which has acted in more ECT-lawsuits than any other firm (see table 3 on page 49). In just 5 of their known 16 ECT cases (the only ones where this information is public), Allen & Overy lawyers have billed more than US$35 million in legal fees.[85]

Ever since the first ECT claim law firms have relentlessly advertised the treaty's vast litigation options to their corporate clients, encouraging them to file claims (see box 7 on page 48). With legal costs for arbitrations going into the millions (see image 15 on page 48), this type of work has made the treaty a true cash machine for the legal industry. No wonder investment lawyers consider ECT cases "sexy".[87] Overall five elite law firms – Allen & Overy, King & Spalding, Arnold & Porter, Freshfields , and Weil Gotshal – have been involved in nearly half (46 per cent) of all known ECT investor lawsuits.[88]

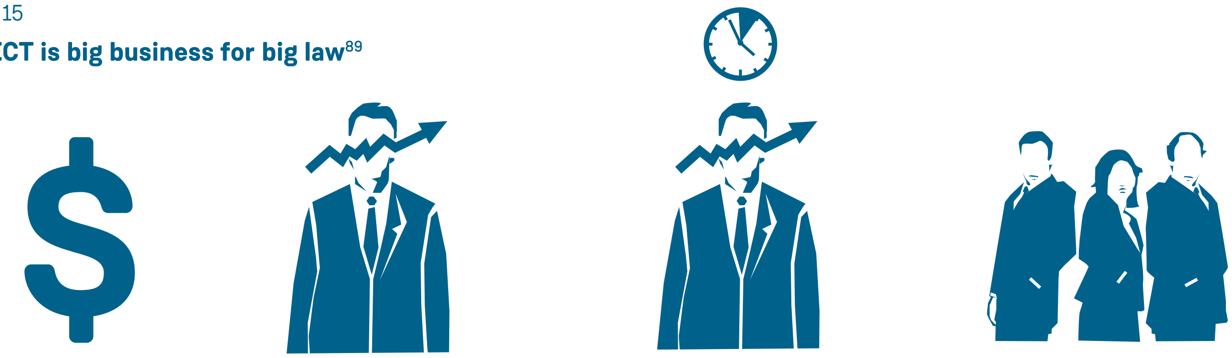
When I started practicing, a multimillion dollar claim was big. Now we've reached the point where a law firm can have a portfolio of 50 or even 100 billion dollars in claims at any given point in time.

Lawyer George Kahale III who has defended many countries in investor-state claims[86]

Investment lawyers are also likely to have encouraged clients to use the threat of costly ECT claims as a way to scare governments into submission. Speaking about investment arbitration more generally, they regularly admit that they are more busy with brandishing lawsuit

Image 15

The ECT is big business for big law[89]



11
US$ million
average legal costs for investor-state disputes

90%
of the legal costs end up in the pockets of lawyers representing the parties

1,000
US$ per hour
billed by elite law firms – per lawyer

3,000
US$ per day
arbitrator fees at the tribunal used most frequently for ECT claims, the International Centre for Settlement of Investment Disputes (ICSID)

Box 7
How investment lawyers advertise the ECT's litigation options to their corporate clients

Renewable bonanza? Law firm Steptoe & Johnson has explained to producers of dirty energy that they "may well have strong arguments" for making the case that the introduction of binding production targets for renewable energy violated their "legitimate expectations that the proportion of energy from non-renewable sources would not be decreased".[90] According to Steptoe, green energy targets could result in a breach of the fair and equitable treatment standard in ECT-style investment treaties, potentially paving the way for multibillion-euro compensation awards.

Tax bonanza? Investment lawyers regularly alert companies to international arbitration as a forum to challenge taxes on fossil fuels. As a King & Spalding lawyer explains: "The economics of an independent power project or of an oil and gas project can be severely impacted if a host State changes the tax regime applicable to the project after an investor has committed its capital."[91] While the ECT excludes some tax matters from its scope, according to the lawyer, contracts with "specific stabilization commitments" can fill the gap and protect investors from "adverse changes" in tax regimes. One can easily see how such arguments could be used to squash hefty taxes intended to prevent the exploitation of more fossil fuels.

Brexit bonanza? Several law firms have suggested that investors could bring ECT lawsuits against the UK as a result of Brexit.[92] They argue that the radical changes which Brexit could trigger in the energy sector – higher tariffs for energy imports or scrapped research funding – could be seen as "the UK Government's failure to maintain a stable legal framework"[93] and a violation of the ECT's fair and equitable treatment standard. "If amendments to the regulatory framework for renewable energy in Spain amount to a violation of fair and equitable treatment, then so does the UK's withdrawal from the EU", goes the argument. "Indeed far more so, since the UK has spent 40 years in the EU and no other member state has ever withdrawn to date."[94]

Foreign investors are already considering potential claims against the UK.

Thomson Reuters Practical Law online service[95]

Table 3
The 10 busiest law firms in known ECT claims[96]

Law firm	Total number of ECT cases	Role in ECT claims	What you should know about the firm[97]
Allen & Overy (UK)	**16**	Works for investors (with very few exceptions).	Brough the first-ever ECT-based arbitration in 2001 (of US energy giant AES vs. Hungary). Today suing Spain is their main asset: 10 out of the firm's 16 total known ECT engagements are against Spain. The firm also represented AES when it challenged Hungary's attempt to curb excessive profits of energy generators in 2007.
King & Spalding (US)	**15**	Has only represented investors.	If there is one Big Oil law firm, this is it. But in the ECT world they are mainly engaged in the renewable claims against Spain and Italy. Also representing UK oil company Rockhopper in a claim that hit Italy after its exit from the ECT, challenging a ban on offshore oil drilling.
Arnold Porter Kaye Scholer (US)	**10**	Has only represented states, but acts on both sides in ISDS disputes more generally.	No firm has been appointed more often by states in ECT disputes. Several of its lawyers are on the ICSID list of arbitrators (and can be picked as tribunal presidents when parties can't agree).
Freshfields Bruckhaus Deringer (UK)	**10**	Represented mostly investors.	The world's busiest ISDS firm with involvement in 45 investment treaty cases in April 2018. Represents EVN challenging Bulgaria's decision to lower escalating energy prices.
Weil Gotshal & Manges (US)	**9**	Represented mostly states, but acts on both sides in ISDS disputes more generally.	Represents the Czech Republic in its six ECT cases (together with Arnold Porter). Also acted as counsel for Czech energy behemoth ČEZ, which won a €100 million settlement after a failed energy privatisation in Albania.
Cuatrecasas, Gonçalves Pereira (ES)	**8**	Has only represented investors.	All its arbitrations are against Spain, including the first known claims by Japanese investors.[98] The top lawyer at the ECT Secretariat joined the institution after nearly 13 years with Cuatrecasas – a notable revolving door case.
White & Case (US)	**7**	Represented mostly states, but acts on both sides in ISDS disputes more generally.	Another veteran ISDS law firm with over 100 cases which it handled at ICSID in total and 35 ongoing investor-state lawsuits in April 2018.
Latham & Watkins (US)	**7**	Has represented both states and investors.	The world's second richest law firm by revenue has a knack for Spanish elites: amongst others, it represented Spanish businessmen Luis Delso and José Gomis in their suits against Spain while hiring Spain's former Prime Minister José María Aznar as political advisor in early 2018.[99]
ArBLit - Radicati di Brozolo Sabatini (IT)	**6**	Has only represented investors.	A small boutique with a near exclusive focus on international arbitration. Nearly all cases relate to changes in the Czech renewables sector.
Shearman & Sterling (US)	**6**	Has only represented investors.	The US$1,065 per hour lawyers from the Yukos mega arbitrations. Elite arbitrator Emmanuel Gaillard is the firm's figurehead, attracting vast amounts of work as counsel in ISDS cases.

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.

Michael Nolan of law firm Milbank, Tweed, Hadley & McCloy[100]

threats to halt or roll back government action, than with the sliver of cases that actually go to arbitration and become public. ECT cases in which such corporate threats of arbitration are successfully used to stall action to limit greenhouse gas emissions, might never come to light.

Law firms profiting twice

Sometimes smart lawyers have managed to profit twice: first, when advising on a risky investment and then again as counsel in ECT-disputes when the risk did not pay off. Herbert Smith Freehills, for example, first advised Luxemburg-based investors RREEF and Antin when they acquired solar thermal power plants in Spain in 2011 (when the country was already cutting its support for renewables and two years before the investors sued Spain over these cuts).[101] Later the law firm defended the Spanish Government in two similar ECT-claims (by Charanne and PV Investors).[102] In the Charanne case, the arbitrators described the lawyers' massive bill as "disproportionate". Note it is Spanish taxpayers who will foot the bill.

Arbitrators riding the ECT arbitration boom

The three private lawyers who decide investor-state disputes under the ECT, the arbitrators, have enormous power: they alone decide if a government decision, a court ruling, or a law emanating from parliament has violated the ECT's vaguely formulated investor rights. Their compensation awards against states can divert billions of taxpayer money to corporations.

ISDS arbitrators have broad power over public budgets due to their authority to award uncapped amounts of compensation to foreign investors. States have no opportunity to avoid liability after the arbitrators issue their decision.

Professor Gus van Harten, Osgoode Hall Law School[103]

According to specialised *Global Arbitration Review* magazine "only unknown Swedes seemed to be appointed to Energy Charter Treaty cases" in the first years of the agreement's existence. But as the sums at stake grew, more and more "A-list arbitrators" began to populate the tribunals. An ECT case is now "something they all want to have on their CV."[104] At the end of 2017 88 per cent (22 out of 25) of the most powerful people in the world of investment treaty arbitration (the "power brokers" identified in a recent academic study[105]) have acted in ECT tribunals.[106]

The term "A-list arbitrators" refers to a small group of commercial lawyers who are also known as the "inner mafia".[107] They have captured the decision-making in a large number of investor lawsuits around the world and frequently combine their arbitrator role with several other hats, for example, representing the disputing parties in investment claims as counsel, or acting as academics.[108]

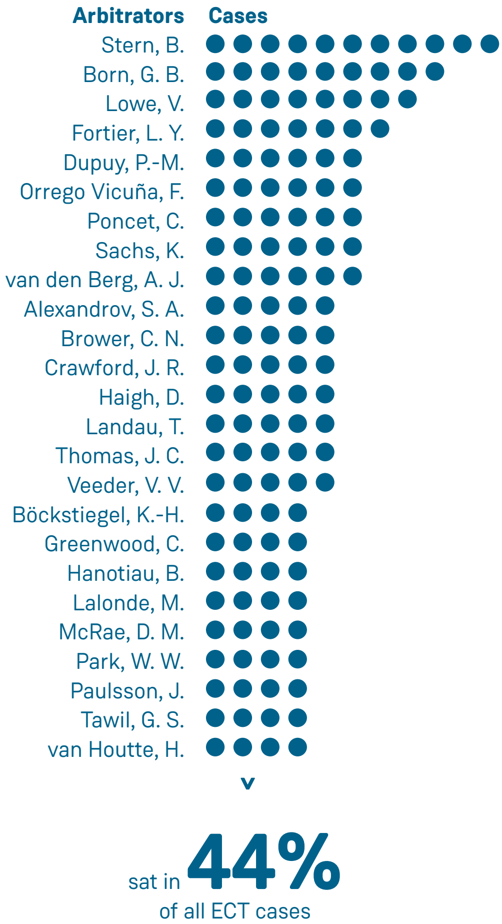
Should you let a group of foolish lawyers interfere with saving the planet?

Nobel Prize-winning economist Joseph Stiglitz[109]

Big business for the 'mafia'

A total number of 142 arbitrators have sat in ECT tribunals known about up to the end of 2017. They have either been selected by the investor, the state, or have acted as president of the tribunal (selected by the disputing parties, the two co-arbitrators or institutions such as ICSID). Most of these arbitrators were involved in just one or two cases. But a select group has been appointed more frequently: 25 arbitrators – 18 per cent of all people who ever sat in ECT-tribunals and just 4 per cent of all known investment arbitrators globally[110] – sat in 44 per cent of the ECT cases.[111]

Image 16
Who decides ECT cases?



As repeat players, these arbitrators have enormous power to influence how the ECT's investor privileges are interpreted. The considerable concentration of cases in their hands also suggests that they have a significant career interest in ECT claims. This is problematic because it poses the danger of making arbitrators overly receptive to investor interests: the more the ECT pays out for investors, the more likely they are to file future claims, generating more income for the arbitrators. As the latter earn handsome rewards for their services (see image 15 on page 48), there is a significant financial incentive to interpret the ECT in favour of investors.

To put it simply, if a doctor is sponsored by a pharmaceutical company, we might question whether the medicine prescribed is the best for our health; if a public servant receives money from a lobbyist, we might question whether the policies they promote are in the public interest. In the same vein, if an arbitrator's main source of income and career opportunities depends on the decision of companies to sue, we should wonder how impartial their decisions are.

Arbitrators' many hats

Two thirds (16) of the 25 ECT super-arbitrators have acted as lawyers in other investor-state proceedings.[112] This "double hatting" opens a Pandora's Box of conflicts of interest, for example, when an arbitrator has to decide without prejudice on an issue that also features in another case in which she acts as counsel. Arbitrator Philipe Sands explains the conundrum "that may arise if a lawyer spends a morning drafting an arbitral award that addresses a contentious legal issue, and then in the afternoon as counsel in a different case drafts a pleading making arguments on the same legal issue. Can that lawyer, while acting as arbitrator, cut herself off entirely from her simultaneous role as counsel?... Speaking for myself, I find it difficult to imagine that I could do so...."[114]

Individuals who are regularly engaged in international investment arbitration have the opportunity to exercise significant material influence in the system.

Researchers from the University of Oslo on the revolving door in investment arbitration[113]

A telling example of an ECT arbitrator wearing more than one hat is Stanimir Alexandrov, who presided over several cases against Spain. Spain questioned his impartiality as an arbitrator because of his close ties with consulting firm the Brattle Group, which the investors had engaged to calculate the damages they demanded from Spain in two cases. Alexandrov has worked with the consultancy in four other cases where he acted as counsel for investors. Which damages calculation

Many of our lawyers have held high-ranking government positions, taught international arbitration in the world's leading universities, and sat as arbitrators.

Weil Gotshal & Manges, one of the busiest law firms in ECT arbitrations[115]

Table 4
Some of the busiest ECT arbitrators with a track record of siding with corporations

Total number of ECT claims	Role in ECT claims	Law firm	What you should know about the arbitrator[116]
Gary Born (US)			
9	Exclusively nominated by investors	Wilmer Hale	ECT cases against Spain and the Czech Republic boosted his rather recent career as super-arbitrator.[117] A real go-to arbitrator for investors who appointed him in 18 of his total 20 ISDS cases.[118] In the infamous Philip Morris suit over anti-smoking laws in Uruguay, Born was the only arbitrator who sided with the tobacco giant.[119]
Yves Fortier (Canada)			
7	Nominated by investors in 3 cases; sat 4 times as President	20 Essex Street Chambers (2011-) Norton Rose (1992-2011)	All concluded ECT cases, which involved Fortier, were investor-wins, including Yukos where he billed a staggering €1.7 million for his services as tribunal chair. For many years Fortier sat on company boards, including those of mining giants Alcan Inc. and Rio Tinto, where he developed a corporate world view.[120]
Charles Poncet (Switzerland)			
6	Exclusively nominated by investors	Poncet Law (2017-) CMS (2014-2017) ZPG Avocats (1986-2014)	A prime example of a corporate lawyer turned arbitrator. ECT cases make up 60 per cent of his arbitrator caseload,[121] but he has also acted as counsel for energy giants like Repsol.[122] He was the investor-appointed arbitrator in the Yukos cases where he billed €1.5 million. This seems to have earned him a pro-investor reputation: when Rockhopper choose Poncet as arbitrator in its ECT challenge against Italy, investors celebrated, saying the claim would now be "a walk in the park".[123] Poncet is also on the board of financial services company London Capital Group.[124]
Stanimir Alexandrov (Bulgaria)			
5	Nominated by investors in 4 cases, as President in another.	Sidley Austin (2002-17); continues to co-counsel with the firm	A prominent "double hatter" and revolving door case. After being Vice Minister for Foreign Affairs and investment treaty negotiator with the Bulgarian Government in the 1990s, he moved to law firm Sidley Austin where he sued countries in ISDS proceedings, acting as lawyer for major corporations like Vivendi, Bechtel, Veolia, Philip Morris,[125] and TransCanada, the pipeline developer that sued the US after the government halted the dirty Keystone XL pipeline.[126] He continues on-the-side-lawyering with Sidley. Many states have questioned his arbitrator independence over different conflicts of interest, including in ECT cases.[127]
Charles Brower (US)			
5	Exclusively nominated by investors	20 Essex Street Chambers (2005-) White & Case (1961-2005)	The "reigning king of international arbitrators"[128] and the ultimate pro-corporate arbitrator who sat in 45 known ISDS tribunals, but was never nominated by a state.[129] He is well-known for his investor-friendly interpretation of vaguely worded treaty clauses[130] and as being an ardent defender of the status quo in investment arbitration. He opposes reforms to ISDS, for example, to improve the independence of the system, and has attacked reform-oriented colleagues for "bringing termites into our wooden house of investor state dispute settlement".[131]

method an arbitrator follows can make a big difference for how much money a state has to pay. When Spain learned about Alexandrov's ties with the Brattle Group, he had already co-ordered the country to pay €128 million to private equity fund Eiser, based on the consultancy's maths. In a second case, he has now stepped down.[132]

Investor-friendly interpretations of the ECT

Key ECT clauses such as the concept of investment or investor are formulated very vaguely. Therefore arbitrators have wide discretion to interpret ECT rules in a narrow (state-friendly) or an expansive (investor-friendly) way. Globally, arbitrators have consistently adopted investor-friendly interpretations.[133] This pattern seems to be particularly striking under the ECT.

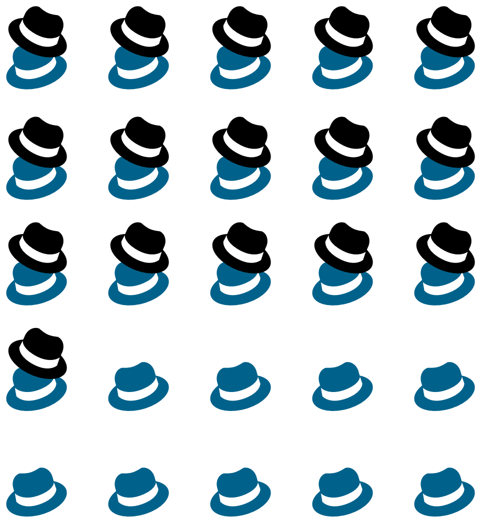
Emblematic examples include Charanne against Spain[135] and Yukos against Russia (where the arbitrators accepted suits from 'foreign' investors, which were in fact nationals of the countries being sued), Energoalians against Moldova (where they decided that a debt acquired under an electricity supply agreement could be considered an investment[136]) and the many cases in which arbitrators have determined that the ECT's "fair and equitable treatment" standard protects investors' mere "legitimate expectations" (which essentially turns expectations into enforceable property rights and binds governments not to change the law if it frustrates the profit hopes of an investor).[137] Such expansive interpretations not only matter for the concrete case, but also increase investors' future chances of success, paving the way for even more challenges against states. A key way for arbitrators to perpetuate and expand the ECT regime – and their business opportunities.

Buying into ECT-claims

Another group of profiteers who seem to have discovered the ECT as a staggering engine of profit are third-party funders. These investment funds back corporate suits against governments by paying parts of the legal costs in exchange for getting a large share in any eventual award or settlement at the end. Third-party funding risks increasing the dangers of massive ECT claims against states, as investors whose claims were considered too costly to pursue obtain financing.

Take Rockhopper's ECT challenge of Italy's ban on offshore oil drilling (box 12 on page 81). The company's legal costs are "fully funded"[138] by an unknown litigation funder. In other words: suing Italy costs Rockhopper nothing. The oil company can easily draw out the proceedings, increasing Italy's defence costs and making the country more likely to cave in to its demands – rather than risk the time and expense of a legal fight backed by a deep pocketed financier.

Image 17
Double-hatting of ECT super-arbitrators



16 out of 25 have acted as lawyers in other investment proceedings.

What's important to understand is that virtually all new developments in this field go in the direction of expanding investor protection beyond anything imagined by the states that created the system.

Lawyer George Kahale III who has defended many countries in investor-state claims[134]

That process is costing us nothing. If we win, we have to give some of the money to the funder.

Sam Moody, CEO of Rockhopper, on the company's ECT arbitration against Italy[139]

Box 8
The Stockholm Chamber of Commerce (SCC)

When they sue states via the ECT, investors can choose between different institutions to govern the dispute. According to a working paper by the OECD (Organisation for Economic Cooperation and Development) from 2018, these institutions are at the "apex" of the investor dispute system – and arguably the arbitration industry – because they "appoint arbitrators and in particular the chair in a significant number of ISDS cases".[140] As the institutions compete for ISDS cases, there are growing concerns about "self-dealing or even a kind of institutionalized corruption".[141] An institution might for example appoint a certain arbitrator in return for having been picked as the administrator in a previous ISDS case where the arbitrator acted as the investor's lawyer – or vice versa.

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) is investors' second most popular choice for ECT claims (after ICSID). Of all claims known by the end of 2017, 20 per cent were administered by the SCC.[142] So the SCC plays a much larger role in ECT proceedings than in investor-state claims globally (where it handled only around 5 per cent of the known disputes[143]).

Here are three key reasons why the SCC's role in ECT arbitrations is extremely problematic:

1. **The SCC is particularly secretive.** It claims to have administered 92 investor-state disputes,[144] but the most comprehensive public database for these lawsuits contains only 46 of them.[145] So there are nearly 50 investor-state cases under the auspices of the SCC which are completely hidden from the public. For the other cases, next to no information on the proceedings and their outcome is in the public domain. This makes the SCC highly inadequate for resolving disputes which deal with public policies and billions in taxpayer money.

> **The parties that usually turn to the SCC do so because they prefer to maintain the confidentiality of the proceedings.**
>
> Lawyers of law firm Weil Gotshal & Manges[146]

2. **Arbitrations at the SCC could be especially costly for states.** An analysis of 140 investor-state cases handed down globally as of 2010 found that arbitrations under the rules of private business organisations such as the SCC tend to lead to more costly awards against states: "investors were about 60 percent less likely to receive an award of less than $1 million and 80 percent more likely to get an award over $500 million when commercial venues, such as the... SCC, were used (for example, compared to the ICSID...)", the researchers found.[147]

> **The very active participation of members of the SCC Board in the SCC decision making process... is one of the hallmarks of SCC arbitration.**
>
> SCC Arbitration Institute[148]

3. **Corporations and the legal industry have a firm grip on SCC arbitrations, rendering them prone to conflicts of interest.** Key decisions such as the appointment of the influential tribunal president (when parties disagree on the appointment), arbitrator replacements (for example, after a challenge to their impartiality) and the determination of their fees are taken by the Board of the Arbitration Institute.[149] It bands together 15 legal experts from large arbitration law firms (eg Freshfields, Arnold & Porter, and King & Spalding, all amongst the busiest ECT firms), large companies (eg chemical giant Pfizer and telecoms multinational Ericsson) and arbitrators (eg Kaj Hobér, the board's current Chair).[150] Might they disqualify an arbitrator with an important role in another arbitration they are involved in? Might they not tend to pick arbitrators with a corporate outlook on the world? And how might the board decide if its decision impacts a board member (as in the case of FREIF Eurowind Holdings Ltd v. Spain where Kaj Hobér is the investor-appointed arbitrator[151])? The many potential conflicts of interest make the SCC an utterly wrong forum for resolving disputes about public policies and public money.

Occasional reports suggest that litigation finance shops are becoming established in ECT arbitrations. German dispute funder Allianz Litigation Funding backed one of the early ECT-claims (Kardassopoulos v. Georgia[152]), an unknown fund is financing another ongoing lawsuit against Italy (Eskosol[153]) and UK-based funder Vannin Capital boasts with its "experience funding… ECT claims, specifically as it relates to Spain".[154] As there is no obligation for companies to disclose external funding underwriting their claims, many more could involve such financiers.

> **Third party funding is poorly regulated internationally. The identity of third party funders is rarely public information and is sometimes even withheld from countries being sued.**
>
> Trade Justice Movement UK[155]

The next bonanza?

Just how much money litigation funders can make when investors sue states was shown in 2016 when Wall Street hedge fund Tenor Capital Management cashed in 35 per cent of a whopping US$1.4 billion ruling against Venezuela (based on the country's bilateral treaty with Canada) – a return of over 1,000 per cent on the US$36 million that Tenor had initially provided for the legal costs.[156]

According to litigation funders and industry experts, similarly profitable ECT arbitration opportunities "loom large on the horizon" as "the shift away from coal and gas to renewables and the debate over the benefits of nuclear power seem likely to keep this sector contentious, especially in Europe".[157] Vannin Capital for example predicts more investor-state claims over energy distribution networks (for example in France), cross border flows of energy (such as in the UK), solar and wind energy (for example in Southern Europe and Germany), and over failed energy privatisations (in Eastern Europe).[158]

According to media reports, there is at least one ECT case where a funder has even bought up a ruling that a panel of arbitrators issued against a state: after private equity fund Eiser won a US$126 million ruling in one claim against Spain, it seems to have sold this award to an unknown funder.[159] This practice is known from Argentina where savvy vulture funds bought up awards from victorious investors – paying roughly 30 per cent of the award's value – and then hounded the country to collect the full payout.[160] Like Argentina, Spain could now find itself pursued by a debt collector with vast legal resources who is not likely to go away, no matter how long it takes to get the money.

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Chapter 4

Going global: Expanding the Energy Charter Treaty into Africa, Asia, and Latin America

Imagine, for a moment, this: in a response to devastating oil-spill pollution in the Niger Delta, local communities force a clean-up and payment by oil and gas multinational Shell via the courts. The company sues Nigeria in an international investment tribunal, claiming the country did not provide "fair and equitable" treatment because it changed its environmental regulations rules on cleaning up pollution. Shell wins and gets billions of taxpayer money in compensation. You think this could never happen? Think again. Because these unimaginable foreign investor wins are perfectly possible under the Energy Charter Treaty (ECT). And Nigeria is just one of many countries from around the world in the process of acceding to the treaty.

Since 2012 the Energy Charter Treaty's Secretariat and certain of its signatory states have been putting great effort into expanding the geographical reach of the agreement. More countries are in line to sign the ECT with its extreme investor privileges, in particular "countries which have a direct impact on the energy security of existing member states".[1] In other words: countries with vast energy resources, particularly in Africa and the Middle East, Asia, and Latin America. The ultimate goal is to make the ECT "an instrument of global energy governance".[2] So, a kind of World Trade Organisation (WTO) for the energy sector. In signing up, these countries risk shrinking their policy space to decide their own energy policy, as well as opening themselves up to the potential for costly lawsuits by investors.

We are looking forward to creating something not only regional but of global importance.

Urban Rusnák, Secretary General of the ECT[3]

The Secretariat in particular has been on a relentless promotion tour. Its staff advertises the ECT at conferences and gala dinners around the world, meeting heads of states, ministers, ambassadors, and other officials and conducting trainings for them. The Secretariat also hosts seconded experts from potential accession countries at its Brussels office. There ECT staff teach them how to "promote an investment-friendly regulatory environment"[4] in their countries and help them prepare the reports required for their accession.

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)[5]

Some ECT country members are active in the expansion campaign too. To give 'political support' to the Secretariat's outreach drive and do their own promotion some host so-called 'Energy Charter Liaison Embassies' in their diplomatic missions in specifically targeted countries: Morocco (the liaison embassy is hosted by the Dutch embassy), Tunisia (hosted by Germany and Turkey), Libya (hosted

Image 18

The many countries and country groupings on their way to acceding to the ECT[6]

Step 1

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 2

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.

Signing the 2015 International Energy Charter

China
Korea

Chile
Panama

Iran
Iraq
Palestine
United Arab Emirates

Benin
Burkina Faso
Kenya
Mali
Rwanda
Senegal
Tanzania
G5 Sahel
East African Community (EAC)
Economic Community of Central African States (ECCAS)
Economic Community of West African States (ECOWAS)[7]

Preparation of accession reports

Expected to start drafting process in 2018
Guatemala
Nigeria

Working on reports
Cambodia
Colombia
Niger
Gambia
Uganda

Validating reports
Bangladesh
Chad
Kingdom of eSwatini (until recently "Swaziland")
Morocco
Serbia

by Poland, with activities currently suspended due to the civil war), Serbia (hosted by the Slovak Republic), Pakistan (hosted by Turkey and Poland), Montenegro (hosted by the Slovak Republic), the United Arab Emirates (hosted by Kazakhstan), and Vietnam (hosted by Hungary).[8]

> **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.**
>
> Nathalie Bernasconi-Osterwalder, International Institute for Sustainable Development (IISD)[10]

Underestimating risks

In the ECT's potential new member states, energy ministries seem to be directing the accession process. Officials from ministries with experience in negotiating investment treaties and defending investor-state arbitrations, on the other hand, appear largely absent. This might explain the alarming lack of awareness about the ECT's political and financial risks in most of these countries. While many of them have disastrous experience with investor lawsuits under other investment agreements,[9] reports written by their seconded national experts, 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"[11] – but say nothing on the risks of the ECT's vast investor privileges.

Step 3

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

Step 4

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.[12]

Invitation to accede to the ECT

Pakistan

National ratification

Burundi
Jordan
Mauritania
Yemen

Submission of relevant documents to the ECT depository

Ninety days later the country becomes an ECT member.

Box 9
Who is driving the ECT expansion?

The Brussels-based **ECT Secretaria**t is clearly in the driving seat. Expanding the geographical reach of the agreement guarantees that the institution remains relevant – and gains power.

Law firms and arbitrators who make money when investors sue states promote the expansion in trainings, expert meetings, and publications. More countries signing up to the ECT will eventually mean more investor lawsuits and more profits for them.

The **EU** funds many ECT outreach activities through "technical assistance" development funds, for example, the secondment of civil servants from African countries to the Secretariat in Brussels and travel costs of Secretariat staff to meet ministers and other officials from accession countries.[13]

Some of the world's largest **oil, gas, coal, and other energy companies** who sit on the Energy Charter's industry Advisory Panel support the expansion "by actively encouraging the involvement of companies from interested countries".[14]

Individual ECT members states such as the Netherlands, Germany, Poland, Turkey, the Slovak Republic, Hungary and Kazakhstan host Energy Charter Liaison Embassies.

This is reminiscent of the 1990s when developing countries signed heaps of bilateral investment treaties hoping they would bring investment whilst remaining largely unaware of the risks. There is a fascinating account of this period from political scientist Lauge Poulsen who travelled the world to ask officials why they signed investment treaties. The astonished reader of his book[15] will learn that, in the past, negotiations for a treaty often lasted just a couple of hours. Sometimes not even lawyers, let alone officials from ministries of justice, were involved. When Pakistan was hit by its first investor-state lawsuit in 2001, based on a 1995 bilateral treaty with Switzerland, no one in the government could find the text and they had to ask Switzerland for a copy. Poulsen concludes that "the majority of developing countries... signed up to one of the most potent international legal regimes underwriting economic globalization without even realizing it at the time".[16] They only understood it many years later when they became the target of a lawsuit. These past mistakes risk being repeated with the ECT.

International investment agreements bite and may have unforeseen risks.

United Nations Conference on Trade and Development (UNCTAD)[17]

A lure for the poor: the International Energy Charter

The International Energy Charter – a political declaration countries sign up to which maps out general principles for global cooperation in the energy field – gives key political momentum to the ECT. While the International Energy Charter, signed by more than 70 countries in May 2015, has neither legally binding force nor financial implications, it has given the ECT a "boost to expansion and outreach", according to the ECT Secretariat.[18] By May 2018, the charter's signatories had grown to 88 countries and regional groupings from all continents.[19]

According to the ECT Secretariat, the non-binding International Energy Charter is "a first step towards accession to the legally binding Energy Charter Treaty".[20] As Maroš Šefčovič, Vice President for Energy at the European Commission put it in 2014: "This new Charter will be an opportunity for new countries to become engaged in the Energy Charter process and to use it as a stepping stone to becoming full-fledged parties to the Energy Charter Treaty."[21]

The energy industry is interested that more countries join the Energy Charter Process by signing the International Energy Charter.

Energy Charter Industry Advisory Panel[22]

Several countries have been pulled far into the ECT accession spiral via the "slippery slope"[23] of this international declaration, including many of the world's poorest states (see image 18 on pages 64-65). Some seem to be on an ultra-fast track: shortly after Gambia signed the international charter in August 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,[24] as well as Algeria, Egypt, Tunisia, Bhutan, Ecuador, Vietnam, and Zambia[25]). Africa seems to be the top target of this recruitment effort, followed by the Middle East, Asia, and Latin America.

Box 10
Busting the myth that the ECT brings investment

ECT supporters claim that its investor privileges help attract investment. In the capital intensive energy sector "investors are... more likely to make a cross-border investment... where the host state provides some form of investment protection," they argue.[26] According to the Secretariat, the right to sue states outside of their national courts has a particularly positive effect – because it serves as a "check, or balance" to the alleged "arbitrary or unlimited use of government power", thereby increasing "the desirability of a State as a potential inward investment destination".[27]

This may sound plausible, but there is one problem: there is no clear evidence that investment agreements actually bring investment. While some econometric studies find that they 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.[28]

Energy investment would of course take place if there was no Treaty.

Howard Chase, chairman of the Energy Charter's Industry Advisory Panel[29]

Governments have also begun to realise that the promise of foreign direct investment (FDI) has not been fulfilled. After South Africa cancelled some bilateral investment treaties (BITs, with investor rights similar to 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."[30] This has also been the experience in other countries. Brazil, for example, is receiving the largest amount of FDI in Latin America[31] – despite being one of the few countries that has never ratified a treaty allowing for investor-state dispute settlement.

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 University[32]

More importantly it is now widely acknowledged that while FDI may contribute to much needed development, the benefits are not automatic. Regulations are needed to generate positive effects such as decent jobs, tax generation, or technology transfer – and avoid the risks that FDI can pose to the environment, local communities etc. The ECT's investment provisions are agnostic on those issues, protecting energy investments irrespective of their nature and impacts. This is true for most investment agreements which "are structured in a manner that primarily imposes legal obligations on governments to provide wide-ranging rights protection to investment by the countries that are party to the treaty. This pro-investor imbalance can constrain the ability of governments to regulate in the public interest", as an official of the Government of South Africa put it.[33]

Image 19

A bulwark for polluters, labour and human rights violations?

Examples of harmful energy projects in ECT accession countries

"When they do their daily coal blast, our houses vibrate like mobile phones."[34]

The **El Cerrejón coal mine in Colombia** has been blamed for displacing indigenous communities, depleting and contaminating water, and harming people's health and traditions.[35] While some of the mine's owners are directly protected through Colombia's existing investment treaties (for example, Swiss mining giant Glencore), other investors are not (for example, the Danish pension funds with shares in the mine's owners[36]). The ECT could empower them to sue Colombia for compensation, for example, if the Government froze the mine's expansion to conduct broad consultations – as is being demanded by the local Wayuu indigenous community.[37] Colombia is preparing its ECT accession reports.

"This will destroy livelihoods of millions of our people depending on fisheries."[38]

The proposed gigantic 5,000km **Trans-African gas pipeline** would take Nigerian 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.[39] Four countries on the potential pipeline route are quite far into the ECT accession (Morocco, Mauritania, Gambia, and Nigeria). All others (Benin, Togo, Ghana, Côte d'Ivoire, Liberia, Sierra Leone, Guinea, Guinea-Bissau, and Senegal) have taken the first step by signing the International Energy Charter (some only as members of the Economic Community of West African States). The ECT would significantly boost the power of foreign investors in all countries on the route as the large majority have hardly any effective bilateral investment treaties.[40]

"The… black snake… is displacing us from our ancestral land."[41]

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.[42] 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.[43] 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.[44] Pakistan has been invited to accede to the ECT.

"We're literally a forgotten community, completely left to the mercy of the multinational."[45]

In a remote corner of the **Sahara desert in Niger**, French nuclear group Areva runs two **uranium mines** and is building a third. People in the area are exposed to high levels of radioactivity, contaminated and depleted water reserves, and a rising number of radioactive dust-related health woes and deaths. They demand better working conditions, compensation for sick ex-workers, a decontamination of the area, and for Areva to pay higher royalty fees – and thus a fairer share of its profits for exploiting the resources of the world's second poorest country.[46] If Niger signs the ECT, Areva could challenge any such government initiative in hideously expensive arbitration lawsuits. Niger has just two effective investment treaties (none with France),[47] but is preparing its ECT accession reports.

"Four people were killed and at least 470 injured."[48]

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.[49] 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.[50] Uganda is preparing its ECT accession reports and has just six bilateral investment treaties in force.[51]

Empty promises

By joining the Energy Charter process and eventually the ECT, many countries hope to attract investment – particularly green investment – to eradicate energy poverty among their people who often lack access to electricity for basic needs like cooking. These high hopes were illustrated by Nigeria's Minister for Justice who said while signing the International Energy Charter in 2017: "Nigeria stands to gain enormously from this Charter as it provides the opportunity to attract investment, ensure that clean energy is available to all Nigerians, increase the level of renewable energy... and support the implementation of the sustainable development goals."[52]

The belief that the ECT brings clean energy investment for all is actively nurtured by the Secretariat and other ECT advocates. Time and again they assert "the Treaty's potential... as a means to attract foreign investments to the energy sector",[53] to "eradicate energy poverty"[54] and "to achieving the climate objectives of the Paris Agreement".[55] A PR leaflet on "Africa and the Energy Charter" promises: "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."[56]

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 claims[57]

The ECT's investment rules, however, do not live up to these promises: there is no evidence that they actually encourage investment (see box 10 on page 67); they protect oil, gas, coal, and other dirty energy projects as much as renewables and do not reward a transition to the latter; and the ECT's investor privileges could even be used to undermine measures that aim at ensuring access to affordable energy for all as well as a transition to green energy systems (see chapter 5).

"China would be very nice"

Due to their relevance for global energy markets, some countries are especially high up on the ECT expansion wish-list, most notably China, Iran, the United Arab Emirates, Nigeria, and the US. The ECT Secretariat is trying to institutionalise the relationship with these "observer countries in a special cooperation" through jointly organised events and publications, the secondment of civil servants to the Secretariat's Brussels office, and the establishment of joint research centres.[58]

„Which country would the secretariat most like to have sign up?" "If we could choose, I would say either the US or China would be very nice."

Graham Coop, now with law firm Volterra Fietta, when he was the ECT Secretariat's chief lawyer[59]

The outreach activities to China by far outweigh efforts towards other countries. The ECT's website is cluttered with publications about how China could benefit from accession and the Secretariat is actively promoting the ECT in op-eds and teach-ins for Chinese companies. The ECT's Industry Advisory Panel and dozens of law firms have joined this ECT promotion tour in China.

This may come as little surprise. China is the world's largest destination of energy investment.[60] It is also a major global outward investor, pushing aggressively into renewables and building new dirty coal and uranium mines, mega dams, as well as oil and gas projects.[61] "China is now standing in the same shoes in which the Western European countries were in the early 1990s – exporting investments (and) building pipelines", ECT Secretary General Urban Rusnák wrote in a comment piece for Chinese media in 2017, arguing that "the ECT could contribute to... protecting Chinese investment".[62] While China has already signed 128 bilateral investment treaties, ECT advocates argue that they don't cover all ECT contracting parties and are "less investor-oriented".[63]

Unlike elsewhere, however, there seems to be some awareness of the ECT's risks in China. A lawyer with Chinese law firm Broad & Bright told a news outlet in 2016: "Chinese laws and policies in the energy sector... are in transition and undergoing changes. Considering the explosion of renewable energy arbitration cases under the ECT, China's joining the ECT will subject China to lots of claims in this area." Referring to the infamous US$50 billion Yukos lawsuit (where Russian oligarchs sued Russia successfully via Cyprus and UK-registered shell companies, see box 4 on page 25), the lawyer also warned of potential "abuse" of the ECT's "foreign" investor privileges through Chinese companies – because "China has many fake foreign investors who are really Chinese investors with round-trip investments back to China."[64]

While investment arbitration under the treaty is a useful tool to protect Chinese outbound investors in the energy sector, it can also be a double-edged sword that would enable foreign investors to sue the Chinese government.

Broad & Bright law firm[65]

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 as 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".[66]

The ECT bites... The $50 billion Yukos record arbitral award, Vattenfall's claim of $4.7 billion [sic] to Germany for shutting down its nuclear plants following the Fukushima disaster, and the dozens of claims for changes to renewable energy laws, are today's harsh outcomes of a Treaty that was negotiated and signed in the 1990s.

Ernesto Bonafé (ECT Secretariat) & Andris Piebalgs (former European Commissioner for Development)[67]

Remarkably, several countries which are reforming their investment treaties to re-gain some policy-space seem ready to undermine these reforms by signing up to the ECT's extreme investor rights from the 1990s. Two examples are Nigeria (expected to draft its accession reports in 2018) and Morocco (validating its accession reports internally). In 2016 both countries signed a bilateral investment treaty which differs significantly from the ECT. For example, it has a more limited definition of investments protected under the treaty (excluding speculative portfolio investment), and it imposes obligations on investors and

Box 11
Busting the myth that the ECT advances the rule of law

Corruption and human rights abuses are serious problems in many countries on the ECT expansion list – and amongst the agreement's current member states as well. Does the ECT advance the rule of law in these countries as its supporters claim?

On the contrary, even in terms of a narrow, procedural conception, the rule of law risks being undermined by the ECT. Here are three key reasons why:[68]

You scratch my back and I'll scratch yours does not advance the rule of law.

Thomas Buergenthal, former Judge at the International Court of Justice, about the on-the-side-lawyering of many investment arbitrators[69]

1) An important aspect of the rule of law is equal access to justice. But the ECT creates a parallel justice system that is exclusively available to some of the richest and most powerful actors in society: foreign investors. This unequal treatment can exacerbate inequality by creating incentives for host states to favour the interests of corporations over those of everyone else.

2) By failing to require investors to first bring their claims to domestic courts, the ECT takes away incentives for the administration and judges to improve the quality of domestic legal systems which would benefit everyone.

3) Investment arbitration under the ECT is highly secretive, riddled with conflicts of interest and glaringly at odds with the principle of judicial independence (as arbitrators are under a strong incentive to side with the claimant investors, see chapter 3.3).

Any expansion of the ECT... should be considered with caution and the burden of proving that the benefits of ISDS outweigh the risks should be placed on those seeking to expand its use.

Kyla Tienhaara and Christian Downie, Australian National University[72]

requires them to take a dispute to a country's domestic courts first (instead of going straight to private international arbitration).[70] They do not appear to be extending this caution over extremely broad rights for foreign investors, however, to their ECT accession. Similarly, South Africa has terminated several investment treaties and is moving away from investor-state arbitration after a shocking investor lawsuit against its anti-discrimination Black Empowerment laws.[71] Yet despite this South Africa is on the ECT's outreach list.

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 a treaty that, if they face the kinds of multi-million dollar claims we have seen with the ECT in other regions, may help to impoverish their public purse.

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7 The image only lists states that are on a clear path towards accession to the ECT. Countries which have signed the International Energy Charter but are already members of the ECT are not mentioned. At the time of writing, 88 states had signed the International Energy Charter, so many more than the ones listed here,

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Chapter 5

The ultimate weapon: how corporations can use the Energy Charter Treaty to kill the energy transition

The sweeping rights of foreign investors under agreements such as the Energy Charter Treaty (ECT) have drawn heavy criticism. In response the legal industry, which profits handsomely from investor-state lawsuits, has launched a powerful defence of its cash-cow. One of its key strategies is misleading the public by framing the ECT as a solution to global warming. In reality the treaty could be a powerful weapon to undermine the transition off fossil fuels. In dirty energy's fight against tough action on climate change and for its own survival, the ECT could become the industry's ultimate weapon – and the polar opposite of the Paris Climate Accord.

Faced with fierce public opposition to investor-state dispute settlement (ISDS), lawyers, arbitrators, and arbitration institutions have mounted a spirited defence by arguing that the ECT and ISDS more generally are effective tools to combat climate change.[1] They argue that by reducing investment risks, the ECT helps to attract capital into clean energy. They also claim that ISDS – probably the most powerful enforcement mechanism in international law today – can put strong pressure on states to keep their promises, as in the many ECT cases in which investors have sued countries for cutting support to renewable energy projects (see box 6 on page 46). Therefore, they argue, ISDS could "fill the lacuna"[2] of global environmental and climate treaties, which typically lack strong enforcement mechanisms to hold states accountable to their commitments.

Two findings from previous chapters bring this reasoning into question. First, investment arbitration under the ECT is seriously flawed (see box 11 on page 72 and chapter 3.3). Proceedings are shrouded in secrecy, riddled with conflicts of interest, and driven by for-profit arbitrators who have outrageously over-read investment law in purely commercial terms rather than in the public interest. The ECT creates a parallel justice system for rich corporations and individuals that is at odds with the rule of law. In short it is an utterly inadequate legal regime for confronting the climate change challenge.

Second, there is no evidence that the ECT actually has a positive impact on flows of investment in any sector, including into clean energy (see box 10 on page 67). 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. As Secretary General of the ECT Urban Rusnák has said: "The ECT is technologically neutral.... We have to use the entire variety of energy sources available and the ECT is friendly to all of them."[3]

The ECT is friendly to all energy sources.

Urban Rusnák, Secretary General of the ECT Secretariat[4]

More importantly the ECT might not just fail to facilitate a transition away from fossil fuels and towards renewables, but could actively impede it. As the energy sector accounts for two-thirds of all greenhouse gas emissions,[5] it will have to be completely decarbonised if we want to avoid catastrophic global warming. This means that new coal, oil, and gas projects have to be stopped; operating ones need to be significantly scaled back or shut down; and our societies need to run on energy that comes 100 per cent from renewable sources such as wind and solar.

But we saw what happened when Germany tried to denuclearise – they were sued by nuclear power plant owner Vattenfall. In a similar way, if countries try to wean themselves off fossil fuels, there is a clear danger that big oil, gas, and coal companies will use the ECT to attack measures that are needed to transition to energy systems that emit virtually no greenhouse gases. While there are not actually many examples of countries large scale decarbonising yet, we could expect a wave of ECT lawsuits should this happen.

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 School[6]

Here we outline eight of the ECT's powers which could derail the energy transition.

ECT power #1: Dissuading governments from effective climate action

It is now commonly held that the threats of expensive ECT-style lawsuits against governments have become more important and occur more frequently than actual claims. Behind closed doors, dirty energy companies openly admit that, as lobbyists of US oil giant Chevron once put it, "ISDS is important as it acts as a deterrent" for decisions they dislike.[7] A journalist has compared the threat of an investor-state arbitration with "flashing a gun at a tense negotiation – better not to use it, but the guys across the table know it's there". After an 18 month in-depth investigation into the issue, he concluded: "The threats are so powerful they often eliminate the need to actually bring a lawsuit. Just the knowledge that it could happen is enough."[8]

ISDS is so tilted and unpredictable, and the fines the arbitrators can impose are so catastrophically large, that bowing to a company's demands, however extreme they may be, can look like the prudent choice.

Pulitzer Prize winning journalist Chris Hamby[9]

It makes sense that any government would try to minimise the legal risk of an incredibly burdensome and costly lawsuit. An investment lawyer and arbitrator explains: "No state wants to be brought under a treaty to an international process. It has an impact upon diplomatic relations, it may have an impact upon a state's credit standing and it may have a direct impact deterring future foreign investment. As a practitioner, I can tell you that there are states who are now seeking advice from counsel in advance of promulgating particular policies in order to know whether or not there is a risk of an investor-state claim."[10] Thus if there is a risk of a punitively expensive legal challenge, governments might think twice before they implement policies which big polluters dislike such as a swift phase-out of coal or a ban on new oil and gas drilling.

In the context of the energy transition, arbitration lawyers openly encourage their multinational clients to use the threat of a costly lawsuit as a way to scare governments into submission. For example, law firm Steptoe & Johnson praises investment protection "as a highly important tool" for energy producers and their lobby groups "in advocating against legislative changes to renewable energy regulations".[11] These changes could be anything from renewable energy targets to cutting fossil fuel subsidies.

Every month I get a threat.... We have to review the risks, how strong the claim is. We try to minimize the costs of the state.

Marie Talasova, lawyer at the Czech Republic's Ministry of Finance and responsible for defending ISDS-arbitrations, including under the ECT[12]

The public is likely to never find out about most ISDS threats and the effects they have had, including when they have been used to stall action on climate change. Government officials will be reluctant to admit they abandoned a policy out of a fear of being sued. According to *Investment Arbitration Reporter*, "it is not so unusual for governments to keep details of investor-state disputes away from the public eye... particularly when it comes to initial threats". In November 2017 the news site reported that Germany was "in consultations with 'companies' in relation to a dispute relating to off-shore wind-power generation" under the ECT. However the responsible ministry refused to reveal any further information, even after parliamentarians requested the names of the companies and details about their complaints.[13]

ECT power #2: Protecting existing and pushing new fossil fuel projects

Climate scientists agree that three quarters of the world's fossil fuels need to stay in the ground if we do not want to wreck the planet.[14] If we dig up more coal, oil, and gas and burn them we will not be able to implement the Paris Agreement and stay below a global temperature increase of 2°, let alone 1.5°, the red line which science and governments have drawn.

But governments, which halt dirty power plants or pipelines to keep fossil fuels in the ground, could be held liable for millions if not billions in damages under the ECT. In a 2011 interview, the ECT Secretariat's lead lawyer at the time made clear why. Speaking about nuclear, oil,

A new 'wave' of state cases is emerging which challenge states' role in implementing environmental and climate protection policies which impact on foreign investors.

Wendy Miles & Nicola Swan of law firm Debevoise & Plimpton[16]

and gas projects he said: "If a state were to allow development in one of these areas for a certain length of time, receiving capital from foreign investors, and then outlaw such development causing investors to lose the capital invested, that might give rise to a claim under the treaty."[15] But this is what many states have done for decades: allowing corporations to extract huge amounts of oil, gas, and coal.

The risk is illustrated by Vattenfall's €4.3 billion lawsuit against Germany over the shut down of two nuclear power plants following the Fukushima nuclear disaster (see box 5 on page 44). Another telling example comes from the North American Free Trade Agreement (NAFTA) between the US, Canada, and Mexico, which includes investor rights similar to the ECT's. In 2013 oil and gas company Lone Pine sued Canada under NAFTA for US$118.9 million due to a moratorium on hydraulic fracturing ('fracking'), a controversial method to extract gas and oil which contaminates water and releases climate-damaging methane into the atmosphere.[17] In both cases, governments could end up paying a high price for protecting the environment.

The ECT can 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 is illustrated by Rockhopper's ECT challenge to Italy's ban on new off-shore oil drilling projects (see box 12) and by another emblematic NAFTA example: in 2016, pipeline developer TransCanada sued the US for a stunning US$15 billion in damages over the Obama administration's rejection of the Keystone XL oil pipeline, which would have increased CO2 emissions by up to 110 million tons per year.[18] While the company withdrew the lawsuit when the Trump administration approved the project, it is worth noting legal experts thought that TransCanada had a good chance of winning.[19]

All cases involved the cancellation of certain licenses or permits, for example for extracting gas, or refusals to grant the required licences in the first place. This is noteworthy because in investor-state disputes globally, corporations have challenged the withdrawal or refusal of licenses more often than any other government measure.[20] In other words: while it is absolutely vital to stop the fossil fuel industry from digging up more coal, gas, and oil, the decisions that are actually needed to limit the extraction are particularly vulnerable to financially crippling ECT lawsuits.

Energy transition from fossil fuels to renewables will require states and state entities to reconsider and possibly recalibrate existing license, concession and production sharing agreements, leading to claims by investors.

Global Arbitration Review magazine[21]

Box 12

How an oil company could make millions with wells it never built: Rockhopper v. Italy

Since May 2017 UK-based oil and gas company Rockhopper has been suing Italy over the state's refusal to grant a concession for oil drilling in the Adriatic Ombrina Mare field.[22] The refusal came after the Italian Parliament banned all new oil and gas operations near the country's coast in 2016 amidst concerns over the environment, high earthquake risks, and strong opposition to the projects from residents.[23] Rockhopper claims compensation for its sunk costs of about US$40 to $50 million – and for the US$200 to $300 million which it could have made with the oil field had it not been banned.[24]

The case is intriguing because it shows how the ECT can be used to...

... circumvent public opposition to dirty energy projects: The Italian Parliament's ban on new drilling projects near the Italian shore followed a decade of protests and campaigning by residents in many coastal regions of Italy. In April 2013 around 40,000 people – "from the Catholic church to rasta-haired youth groups, from the local tourist industry to coastal mayors, regardless of their political affiliation" as campaigners described it[25] – took to the streets in Pescara to protest against the Ombrina Mare project.[26] They could now pay a high price for having pushed the Italian Parliament to halt new climate-wrecking oil drilling.

... sue countries after they have left the agreement: After being hit by its first multi-million euro claim under the ECT, Italy announced it was leaving the treaty at the end of 2014.[28] Rockhopper's claim against the country was registered 27 months later. This is possible because of the deeply anti-democratic survival or 'zombie' clause, which allows the ECT investor rights to live on even after a country has pulled out of the treaty. For investments made before Italy's withdrawal took effect (on 1 January 2016) the country can still be sued for two more decades under the ECT, ie until 1 January 2036. So while the country is already the second most sued state under the ECT, and despite having left, Italy could still be subject to many more claims.

... let deep-pocketed financiers put extra litigious heat on countries: Rockhopper's legal costs are funded by an unknown litigation financier who will cash in a share of the eventual award.[29] This allows the company to draw out the proceedings, increasing Italy's defence costs and making the country more likely to cave in to corporate demands. As such funding arrangements do not have to be disclosed in ECT-proceedings, potential conflicts of interest an arbitrator might have due to ties with the funder might never be un-earthed.

What are you going to tell your kids, your families? That you made money by bullying a peaceful community? That you don't give a damn about climate change and that while the entire planet is talking about keeping fossil fuels in the ground, you have the gall to come to a foreign country and forcefully drill?

Maria D'Orsogna, from the NoOilAbruzzo campaign in an open letter to Rockhopper investors[27]

If we are serious in our fight against climate change, we have to leave around 80 percent of our oil reserves and about a third of our gas reserves underground... I really don't see why Italy, a country which has huge potential in terms of energy efficiency and renewables, should insist on oil and gas drilling.

Monica Frassoni, Italian member of the European Parliament[30]

ECT power #3: Locking-in polluter subsidies

The G20 countries alone subsidise oil, coal, and gas production with a staggering sum of US$70 billion of taxpayers' money every year. The most obvious producer subsidies are tax breaks and direct funding, but there is other support as well (such as providing resources like land and water at below-market prices). This support unlocks what an International Institute for Sustainable Development report calls "zombie energy" which would not otherwise be viable. Removing subsidies to fossil fuel producers, they say, "would be roughly equivalent to eliminating all emissions from the aviation sector".[31]

But cutbacks to state support for fossil fuels would be highly likely to trigger expensive investor lawsuits under the ECT. Ironically – and disastrously for the climate – to date there have been almost no reduction in subsidies by states to fossil fuels, so there hasn't been much to challenge. But given what we have seen from the behaviour of investors when their profits are challenged the ECT could be a very powerful tool for dirty energy companies to sue states and prevent climate action. Thus while no suits against scaled back support to fossil fuels are known to date, the arguments made in previous ECT claims illustrate the form they might take (for example see box 6 on page 46 for the dirty secrets of ECT renewables claims).

Take the first solar case, in which Spain was ordered to pay €128 million in damages to private equity fund Eiser after losing the lawsuit. The arbitrators argued that Spain had violated the ECT's obligation to treat investors in a "fair and equitable" way when it "radically altered" a "favourable regulatory regime" which had attracted Eiser and other investors, but was then "replaced by an entirely new regime".[33] What would happen if today's "favourable regulatory regime" for big oil, coal, and gas (read: billions in fossil fuel subsidies) was replaced by an "entirely new regime" (read: zero fossil fuel subsidies)?

The Energy Charter has been associated with (the) oil and gas industry and the large number of investment arbitration(s) under the Energy Charter Treaty (ECT) may be an obstacle towards removing fossil fuel subsidies and transition to low carbon energy.

From the report about a joint event of the ECT Secretariat and United Nations Conference on Trade and Development (UNCTAD) in July 2016[32]

Fossil fuel corporations have been launching... investment disputes over direct expropriations and other issues, such as tax increases, for decades. Thus, they are already comfortable with ISDS and understand how and when to use it. Applying this tactic to the new era of climate change policy will be fairly straightforward.

Kyla Tienhaara, Australian National University[34]

ECT power #4: Diverting public money needed to fund the energy transition

To reach the goals of the Paris Climate Accord clean energy investments need to be scaled up significantly above current levels – to an average of more than US$700 billion per year.[35] According to a study from the University of Sussex, this will require not only private, but also large amounts of public money. The study found that state banks and public utilities, which are less profit-driven than private funders, have so far been the main financiers of uncertain, high-risk technology projects that achieved innovation in the renewables sector. Public actors have therefore been the true financial "locomotives" behind the energy transition and will have to continue to play that role.[36]

Yet, the far-reaching investor privileges in the ECT and other agreements threaten to divert public monies from the critical task of financing the energy transition. According to UNCTAD the uncapped financial compensation awards which arbitrators can impose on governments can "exert significant pressures on public finances".[37] Governments have already been ordered or agreed to pay US$51.2 billion in damages as a result of ECT lawsuits and legal costs, too, have weighed heavy on public budgets (see chapter 2). This money can no longer be spent on new wind turbines and other sustainable infrastructure, on retraining workers from closed down fossil fuel projects or on providing access to energy for all.

Public funds should be used to support the shift to clean energy not to compensate polluters for their lost future revenues when they have not adapted their business model in a timely and responsible way.

Professor Gus van Harten, Osgoode Hall Law School[38]

ECT power #5: Undermining affordable electricity prices

For the energy transition to be successful and widely accepted it has to benefit everybody, especially those who now lack access to affordable energy for basic needs like cooking or keeping warm. According to the International Energy Agency, 1.1 billion people – 14 per cent of the world population – lack access to electricity, while many more receive poor and inadequate service.[39] The implications for people's health, their education and business can be significant.

Energy poverty is not just a developing country problem. Nearly 11 per cent of the EU population are at risk according to a 2015 study from the European Commission. It identified countries like Bulgaria, Cyprus, and Greece among those where people cannot afford to adequately heat their homes.[40] In the UK, where it is estimated that more people die because of fuel poverty than in road accidents or through drug and alcohol abuse,[41] in 2017 the Government announced a cap on energy prices to end the alleged "rip-off" bills of the country's largest utilities.[42]

Such government action to reduce energy poverty could well trigger investor challenges under the ECT. "In the UK, there's likely to be more regulatory disputes", predicted an investment lawyer at a conference in June 2017, referring to the government's looming "interventionist approach" on energy prices.[43] And the lawyer's vision of litigation was not just drawn from thin air: several Eastern European countries have already been sued for hundreds of millions of dollars in compensation under the ECT – all because they took steps to curb big energy's profits and lower electricity prices.

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 Kong[44]

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.[45] 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. At the time Hungarians paid 16 per cent of their income on energy bills, twice the European average.[46] While the arbitrators ruled against AES in 2010 finding that "it is a perfectly valid and rational policy objective for a government to address luxury profits", Hungary had to pay the bills of its own lawyers and half of the tribunal's costs, US$5.9 million in total.[47] A parallel case by Electrabel from Belgium (owned by French energy giant Engie) was also dismissed in 2015, but again, Hungary had to pay legal costs, this time amounting to nearly US$10.1 million.[48] As there is no legal precedent in ECT cases, the arbitrators could reach different conclusions in other price regulation cases – for example, the three ongoing challenges to the EU's most energy poor member state Bulgaria (see box 1 on page 14).

The investor-state dispute settlement puts companies' rights ahead of human rights. Its effects are devastating... – we must abolish it.

Alfred de Zayas, UN Expert on the Promotion of a Democratic and Equitable International Order[49]

ECT power #6: Locking in the failures of energy privatisations

In many parts of the world communities and governments, particularly on the local level, 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.[50] 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.

As the initial unbundling of former national monopolies was often followed by re-integration, liberalisation and privatisation also paved the way towards new electricity cartels. These tend to be dominated by large, fossil fuel-wedded transnationals that have held back the transition to clean energy for years.[51] Energy systems owned by a few large companies have also helped feed public objections to renewable energy projects, which have sometimes slowed or even blocked their implementation. Meanwhile ordinary citizens are more likely to welcome wind turbines and solar plants if they (co-)own installations and profits stay in the community.[52]

This is why the call for the massive scaling up of renewable energy is nowadays often linked with a call for reclaiming public ownership of the energy system and for putting people and communities at the heart of the energy transition. As British Labour party leader Jeremy Corbyn said in February 2018, "to go green, we must take control of our energy", arguing for public, localised energy systems to tackle climate change.[53]

The transition to an equitable, sustainable energy system can only occur if there is a decisive shift in power towards workers, communities and the public.

Trade Unions for Energy Democracy[54]

But reversing failed energy privatisations can trigger investor-state lawsuits with potential damages claims running into millions. This happened to Albania after it revoked the electricity distribution license of Czech energy giant ČEZ, which filed a €190 million ECT claim in response in 2013.[55] 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, reducing energy losses and investing in the power grid.[56] Albanians had also complained about high prices, poor service or even an absence of it, as well as power shut-downs. In addition ČEZ had faced fraud investigations by Tirana's prosecution office including for issuing fake fines to both real and fictive customers in order to drive up its alleged losses on paper and get price hikes approved by the Albanian regulators.[57] 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.[58]

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 & Overy[59]

Both investment lawyers and speculative litigation funders of the high legal costs in investor-state cases (see chapter 3.3) expect more legal challenges to post-privatisation developments in Eastern Europe's energy sector. "I think it is likely we will see a rise in the number of treaty disputes in relation to electricity in Central and Eastern Europe," predicted a lawyer from Freshfields law firm in 2015, because "the process of privatisation and replacement of electricity infrastructure is much like that which took place in Argentina during the 1990s."[60] This refers to the way that in response to an economic crisis in 2001-02 Argentina took measures to correct some of the negative effects of privatisations, for example, by freezing utility rates to secure people's access to energy. As a result it was met with numerous (and partly successful) investor challenges.[61] Even without an economic crisis such as the one Argentina experienced, lawyers see parallels and consider "inevitable" some new state interventions into Eastern Europe's post-privatisation energy sector.[62] In other words: fertile grounds for future disputes under the ECT.

ECT power #7: Undermining public participation and democratic decision-making

The public right to participate in environment-related decisions is a core principle of international environmental law. It is also included in the Paris Agreement (article 12), which stresses the need to empower citizens to play an active role in combatting climate change, in order to improve the quality of certain actions to reduce emissions and increase support for them. Involving local communities can help overcome barriers to implementing climate action (for example, when there is opposition to a new wind farm from local residents) and even scale up action to combat global warming (for example, by showing communities how cutting their CO2 emissions can save money on fuel bills).[63]

The energy transition is already largely driven by citizens, municipalities, and cooperatives. 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.[64] In other places,

As the anti-fossil fuel forces gain strength, extractive companies are beginning to fight back using a familiar tool: the investor protection provisions in free trade agreements.

Naomi Klein, journalist and author[65]

citizens and communities are confronting polluters by blocking new pipelines, banning fracking, and strengthening regulations on projects that are disastrous for the environment.

But the ECT is a powerful weapon in the hands of fossil-fuel wedded corporate interests. Investors' large financial claims can put pressure on governments to cave in to corporate demands and circumvent public opposition and democratic decision-making. Take the example of the first Vattenfall case against Germany (see box 3 on page 22): it was settled after the local Hamburg Government agreed to relax environmental restrictions on a coal-fired power plant – restrictions that were implemented after years of powerful local "coal kills the climate" protests. Commentators have suggested that this "regulatory chill" was what Vattenfall was truly after all along (the threat of monetary compensation being just a means to an end). And local politicians have admitted that the fear of a €1.4 billion payout of taxpayer money was what pressured them into the settlement.

Other cases which also feature prominently in this report show how the ECT can act as a legal backdoor for investors whose projects are impeded by local democracy: Germany's exit from nuclear power, which is being challenged by Vattenfall, was a consequence of the decades-old, strong anti-nuclear stance by the German public; Bulgaria's decision to reduce electricity prices – now under attack via three ECT-lawsuits – was taken by a new government after the previous one resigned over nationwide protests against high energy bills in 2013; and the Italian Parliament's decision to ban new offshore oil-drilling projects, which is being challenged by Rockhopper, followed a decade of protests and campaigning by residents in many coastal regions of Italy.

Another emblematic example of the treaty's power to circumvent democracy is the ECT lawsuit by Slovenian construction company Viaduct and its owners against Bosnia and Herzegovina.[66] In 2004 Viaduct's subsidiary HES got a concession to build two large hydroelectric dams in a protected water-supply area from the Government of Republika Srpska (one of two entities of Bosnia and Herzegovina). The dams were heavily opposed by the local population and the city Government of Banja Luka who feared that they would displace around 200 houses, endanger wildlife, increase the risks of devastating floods, and raise water prices. When HES submitted a flawed impact assessment the environmental permit required to start the construction was denied and the project stalled.[67] Viaduct now demands at least €51 million in damages for not having been allowed to construct the dams. The ECT could become its true cash-cow – and force the people of Banja Luka to pay a high price for enacting their democratic rights and pushing their Government to act in defence of the environment and the public interest.

It is becoming clear that this system is great for investors but may be ill-suited to democratic governance generally.

Professor Beth Simmons, Harvard University[68]

Box 13
Proposed reforms to the ECT: some window-dressing, many shortcomings

As ECT-style investor privileges are increasingly contested around the world, the EU and others are trying to maintain this legal regime for the global elite by reforming it around the edges. Others have come up with more far-reaching reforms. Several of the ongoing processes and proposals to reform ISDS could impact the ECT and the legal proceedings under the agreement:

Modernising the ECT: In 2017 the Energy Charter constituency began assessing "the potential need and/or usefulness of updating, clarifying or modernising" the ECT's investor rights.[69] But a roadmap for this exercise states that the "investment provisions should remain untouched in their fundamentals".[70] A first discussion paper by the ECT Secretariat excludes several meaningful reform options which are being pursued elsewhere[71] (for example, a requirement to exhaust local remedies for an investor to go to arbitration or the deletion of some particularly dangerous ECT provisions such as "fair and equitable treatment" or the "umbrella clause").[72] Even minor reforms such as making ECT disputes more transparent seem to be controversial amongst ECT members[73] and insiders consider it "not realistic" that the agreement will be amended.[74]

The Multilateral Investment Court project: Under the auspices of the United Nations Commission on International Trade Law (UNCITRAL), the EU wants to establish a Multilateral Investment Court.[75] *If* it ever came about and *if* ECT parties decided to accede to it, this could make future ECT disputes somewhat more transparent, including being presided over by judges with a fixed salary (rather than for-profit arbitrators with strong financial incentives to rule in favour of the investor). The far-reaching substantive investor rights, which are the basis of today's ECT lawsuits however, would not be affected by these procedural reforms. In effect such a court would further institutionalise treaty rights, which are very often more favourable to investors than those found in national law, and which put serious constraints on states to act in the interest of their people and the planet.[76]

An ISDS climate carve-out: A more far-reaching proposal has been developed by Gus van Harten, Professor at Osgoode Hall Law School. In the lead-up to the 2015 UN climate talks he proposed a carve-out for the Paris Accord which would shield actions taken to protect the climate by governments from investor-state lawsuits, including from under the ECT.[77] The formulation did not make it into the Paris Agreement but was supported by the European Parliament.[78] While such a carve-out might safeguard some actions to halt global warming from ECT investor attacks, it would not protect those government decisions not strictly climate-change related but taken in the public interest: for example, price regulations to make energy affordable or restrictions on energy projects which can spell disaster for the environment, but are considered low emitters of greenhouse gases (eg nuclear).

ECT power #8: Endangering a regulatory mega-task

The energy transition is a regulatory mega-task. Moving away from carbon-intensive fuels and towards an economy that relies solely on renewable energy sources requires dramatically new policy frameworks. Yet as the International Renewable Energy Agency has stressed, the "goal is not to create a roadmap set in stone", because "uncertainties… are huge".[79] What is needed instead is a "flexible" regulatory "approach which relies on learning over time," as the UK's gas and electricity regulator Ofgem put it.[80] In other words: policy space to design new laws and regulations, to improve and change them and mitigate against unforeseen side effects. But such policy space is severely limited by the investor privileges in ECT-style agreements – and by the legal industry who treats regulatory changes in the energy sector like a petri-dish for expensive investor lawsuits.

To quote Professor Robert Howse of New York University Law School: "The current investment regime with… ISDS makes it difficult for states to address new regulatory challenges in areas like climate and environment, especially using untried, innovative approaches: in these circumstances, a lot of experimentation may be needed, and the regulatory framework may need to change course in important ways, and sometimes reasonably quickly. And in exactly those circumstances, arbitrators… will force payouts in the hundreds of millions of dollars on states."[81]

The more energy law cases go to arbitration, the more difficult it will become to develop it. And at the moment, energy law is very much about promoting renewables.

Energy law expert[82]

Arbitration lawyers, too, are well aware that the ECT threatens to undermine the energy transition. Writing about the investor lawsuits against Spain and Italy in the renewables sector, two lawyers of law firm Clyde & Co wondered whether "investor-state arbitration under treaties such as the ECT" will not "dissuade states from offering incentives… for renewable energy projects" – out of fear of being sued over potential adaptations to the incentives later on.[83] A lawyer of Debevoise & Plimpton warned: "If the tribunals rule largely in favor of the investors, member states will be even more cautious when designing renewable policies, to avoid commitments."[84] Energy lawyers, too, fear that more rulings against Spain, Italy, and other countries could have a "systemic chill effect on the development of new energy law" to promote renewables.[85] Under the Damocles' sword of expensive ECT claims, governments might shy away from driving forward the much needed energy transition.

As investment increases, projects develop, and states continue to pursue their renewable energy targets, emissions targets and other plans to reduce or eliminate non-renewable energy production, it is inevitable that renewable energy related arbitrations will continue to emerge.

Lawyers of law firm King & Wood Mallesons[86]

The need to go beyond a low-carbon transition

When we consider the ECT's eight powers to undermine the energy transition, we can see it is no exaggeration when Australian academic Kyla Tienhaara writes that "providing fossil fuel corporations with ISDS under these agreements is akin to handing your opponent extra weapons and ammunition before stepping onto the battlefield".[87] The investor rights in agreements such as the ECT have been designed to protect the status quo, and in particular, existing property relations. But tackling climate change will require radical transformation – and quickly. Yet as Tienhaara argues: "For as long as there is any ambiguity in the substantive provisions of investment agreements – allowing cases to play out over several years, cost millions, and leave governments uncertain about outcomes – there will be policy delays. In a rapidly warming world, we simply cannot afford these delays." In sum, the Energy Charter Treaty is truly the antithesis of the Paris Climate Agreement.

Providing fossil fuel corporations with ISDS... is akin to handing your opponent extra weapons and ammunition before stepping onto the battlefield.

Kyla Tienhaara, Australian National University[88]

And yet it is also worth noting that many proposals to achieve a transition towards an economy that relies solely on renewable energy sources go much further than the Paris Agreement. They reject market-based solutions to the climate crisis which reduce it to an issue of carbon alone, thereby perpetuating problems of resource grabbing and the dispossession of communities. Instead, they promote concepts like "climate justice" and "energy democracy",[89] which are not just about de-carbonising the energy system, but about putting "racial, social and economic justice at the forefront of the transition to a 100 per cent renewable energy future".[90] This includes challenging the concentration of power and wealth in the hands of a few polluting corporations as one of the systemic root causes of the climate crisis; it is also about reclaiming all aspects of the energy sector which have been privatised or commercialised; and it is about transforming energy systems so that they are democratically controlled and collectively owned to benefit workers and communities rather than large corporations.

Needless to say, such a radical shift towards energy democracy has many opponents, not least large fossil fuel corporations who see it as an existential threat. With the ECT and other international investment agreements, these polluters have a formidable weapon on their side.

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Chapter 6

Conclusion: Eight reasons for leaving (or never joining) the Energy Charter Treaty

In the Lord of the Rings story, the "One Ring to rule them all" can only be destroyed by melting it in the volcanic mountain where it was forged. Similarly, the power of the Energy Charter Treaty (ECT) can only be defused by those who created it: the states which have signed on to it.

As soon as a country has been a member of the ECT for five years it can withdraw from it at any time. Put another way: nearly all 48 states[1] plus the EU and Euratom, which fully apply the ECT and its extreme investor privileges, could pull out of the treaty right now.[2]

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

Reason #1: The ECT is a tool for big business to make governments pay when they regulate to fight climate change, make energy affordable, and protect other public interests. It has been used to attack environmental restrictions on dirty power plants, bans on climate-wrecking new fossil fuel projects, cuts to soaring electricity prices, rectifications to failed energy privatisations – and the list goes on.

Nearly all 48 states plus the EU, which fully apply the ECT and its extreme investor privileges, could pull out of the treaty right now.

Reason #2: Under the ECT governments can be forced to pay out billions in taxpayers' money to compensate corporations, including for missed future profits that they could have earned in theory. The value of the ECT lawsuits pending at the end of 2017 – US$35 billion – exceeds the GDP of many countries and the estimated annual amount needed for Africa to adapt to climate change. Due to the opacity of ECT arbitrations, the actual figure is likely to be much higher.

Reason #3: The ECT is an instrument to undermine democracy and bully decision-makers, acting as a brake to desirable policy-making. This is particularly worrying for the rapidly-needed transition off fossil fuels and to wind, wave, and solar energy, which requires bold regulations by governments and will curtail the profits of some of the world's largest oil, gas, and coal corporations.

Reason #4: Investor-state arbitration under the ECT is highly flawed. It is not fair and independent, but dominated by a self-serving, multi-million dollar industry of elite law firms, arbitrators, and speculative funds. At the expense of states and taxpayers, they have used their power to secure extremely corporate-friendly interpretations of the ECT and a steady flow of costly lawsuits.

Reason #5: The ECT's investor privileges do not bring the economic benefits claimed for them. There is currently no evidence that the agreement helps to reduce energy poverty and facilitate investment, let alone investment into renewable energy. The ECT can even be used to undermine the clean energy transition and measures to guarantee affordable access to electricity for all.

Reason #6: The rules for settling investor disputes under the ECT undermine domestic legal systems and are at odds with the rule of law as they discriminate, being an exclusive legal channel for foreign investors alone. Following a recent ruling by the EU's highest court, it is questionable whether the ECT's investor privileges are even compatible with EU law.

Reason #7: It is highly unlikely that the ECT modernisation process, which started in 2017 will change the fundamental flaws of the agreement's parallel justice system for corporations. Even minor reforms such as making investor lawsuits less secretive seem to be controversial within the ECT membership.

Reason #8: Due to its wide geographical reach and the near limitless rights it grants to investors in the energy sector, the ECT is arguably more dangerous for the public purse, public interest policies and democracy than other international investment treaties. Globally, no other agreement has triggered more investor attacks against states than the ECT.

In a nutshell, the ECT is fundamentally an obstacle to dealing with the key challenge of our current historical moment, global warming. At a time when all attention should be focused on averting a climate catastrophe, there is no space for an agreement that would make many of the solutions to this problem illegal. Expanding the ECT geographically and transforming it into a kind of World Trade Organisation (WTO) for the energy sector risks locking even more countries into corporate-controlled and fossil-fuel-addicted energy systems.

But there is some good news. Around the world the tide is turning against ECT-style super-rights for corporations. Campaigners, activists, academics, and parliamentarians are beginning to ask critical questions about the ECT. The agreements and the investor lawsuits which it has enabled could also come under legal fire from EU courts. And Russia and Italy have shown that the world keeps turning (and investment flowing) when a country leaves this dangerous agreement.

In the Lord of the Rings, the "fellowship" of nine companions around the little hobbit Frodo Baggins manages to destroy the One Ring. Maybe the growing number of citizens, legal scholars, parliamentarians, courts, and governments who are beginning to raise critical questions over this once arcane international agreement is a good start for a fellowship that will eventually break the power of the ECT, the "one ring to bind them all".

References chapter 6

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Corporate Europe Observatory (CEO) is a research and campaign group working to expose and challenge the disproportionate influence that corporations and their lobbyists exert over EU policy-making. CEO works in close alliance with public interest groups and social movements in and outside of Europe to develop alternatives to the dominance of corporate power.
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