

OPEN LETTER ON THE ENERGY CHARTER TREATY (ECT)

9 December 2019

*Dear Ministers,
Commissioners,
Members of Parliament and of the European Parliament,*

We are writing to you as concerned civil society groups and trade unions from member states of the Energy Charter Conference, which will hold its annual meeting in Brussels over the next two days (10-11 December 2019). A first negotiation round to modernise the Energy Charter Treaty (ECT) will take place on 11 December.

We – 278 environmental, climate, consumer, development, and trade related civil society groups, as well as trade unions – believe that the ECT is incompatible with the implementation of the Paris Climate Agreement, just transition policies developed together with workers and their unions, and other necessary public policy measures. The ECT has been – and will increasingly be – used by fossil fuel and nuclear energy companies to challenge government decisions to phase out such energy sources. It can also be an obstacle to prioritising investment in renewable energy and energy efficiency, to bringing energy production under public control, and to taking measures to end energy poverty. The ECT in its current form is outdated and a threat to the public interest.

We therefore call on you to ensure that the ECT can no longer undermine action to avoid climate breakdown, protect the environment, and make energy affordable for all. We also call on you to immediately halt the geographic expansion of the ECT to even more signatory states.

The ECT includes many rules – including on energy transit and trade – but the provisions protecting foreign energy investments are of particular concern. They allow foreign investors in the energy sector to directly sue ECT signatory states outside of existing courts, in secretive international tribunals consisting of three private lawyers. In these tribunals investors can claim dizzying sums of public money in compensation for government actions that they argue have affected their profits.

We identify six key problems with the ECT:

1 The ECT protects fossil fuel investments and infrastructure, and is used to challenge and undermine necessary climate action. Since 2017, the UK company Rockhopper has been suing Italy over a ban on new oil and gas operations near the country's coast, claiming up to \$350 million in compensation;¹ in 2017, Canadian company Vermilion

threatened to sue France over a proposed law to end fossil fuel extraction, which was then significantly weakened;² and in autumn 2019, German company Uniper announced that it would sue the Netherlands and claim compensation if the country approved a law to phase out coal-fired power plants.³ We are likely to see more ECT lawsuits against climate action in the future as governments start to develop plans for climate neutrality and a clean energy transition. There is a real risk of so called 'regulatory chill', where governments are discouraged from taking action when faced with massive compensation claims.⁴

2 The ECT puts public budgets and taxpayers' money at incalculable risk. Private tribunals can force states to pay out billions to compensate investors, including for entirely hypothetical missed 'future profits' that are not compensatable under national or EU law. Under the ECT, governments have already been ordered or agreed to pay a total of more than US\$51.6 billion in damages from the public purse.⁵

3 The ECT could threaten the promotion of renewable energy. The ECT creates a risk for those regulators who discriminate between different sources of energy.⁶ This could deter governments from taking urgently-needed measures to favour renewable energy at the expense of carbon-intensive investments. In addition, the ECT neither protects investments in energy efficiency, nor other measures to reduce energy demand.⁷

4 The ECT can undermine environmental protection. One example is Swedish company Vattenfall's €1.4 billion ECT legal attack from 2009 on environmental standards for a coal-fired power plant in Germany. According to officials, the amount at stake forced the local government to weaken the regulations and settle the case, exacerbating the environmental impacts that the plant will have on the local river and its wildlife.⁸ In Vattenfall's second and ongoing ECT suit against Germany, the company is claiming €6.1 billion for the country's accelerated nuclear exit following the Fukushima disaster.⁹ In November 2019, Australian company Aura Energy put Sweden on notice of an ECT dispute over the country's 2018 decision to ban uranium mining over environmental and health concerns.¹⁰

5 The ECT can be used to attack measures to make energy affordable and put it under public control. Several Eastern European countries have been sued under the ECT because they took steps to curb big energy's profits and to lower electricity prices for consumers.¹¹ ECT provisions can also be used against initiatives to bring energy production and services under public, democratic ownership and control, and reverse the negative impacts of failed energy privatisations.¹²

6 Investor-state arbitration under the ECT is at odds with the rule of law and undermines domestic legal systems. Contrary to the principle of equal access to justice,

the ECT creates a parallel justice system that is exclusively available to some of the richest and most powerful actors in society: foreign investors. ECT arbitrations are highly secretive and riddled with conflicts of interest as arbitrators earn big money with cases and have an interest in sustaining the boom in ECT disputes.¹³ The European Court of Justice, through its 2018 Achmea ruling, has put into question the legality of these parallel private judicial proceedings inside the European Union.

Moreover, the ECT's investor privileges do not bring the claimed economic benefits. There is currently no evidence that the agreement helps facilitate investment to reduce energy poverty, let alone investment into renewable energy.¹⁴

As it stands, the modernisation process is unlikely to fix these failures. The EU's mandate for the negotiations, for example, does not foresee an end to investment protection for fossil fuels, nor an exclusion of investment arbitration or other types of investor-state dispute settlement from the ECT.¹⁵ Any changes to the ECT to make it compatible with the Paris Agreement would have to be agreed unanimously by all its members, many of whom are key fossil fuel producing or trading countries. Some members have already stated that they see no need to revise the ECT at all.¹⁶

We therefore call on you to:

- Include as a condition for entering negotiations to modernise the ECT the **removal of provisions that protect fossil fuels**;
- Request the **removal of investor-state dispute settlement** provisions from the agreement;
- **Withdraw from or jointly terminate the ECT**, if the modernisation process fails to promptly make the agreement climate- and environment-proof by removing investor-state dispute settlement and protections for fossil fuels;
- Immediately **put a brake on the process to expand the ECT** geographically to ever new states and to not allow any treaty accessions as long as the ECT is in its current state.

Yours truly,

Signatory organisations

International organisations

350.org
CEE Bankwatch Network
Friends of the Earth International (FoEI)
Greenpeace
Naturefriends International (NFI)
Public Services International (PSI)
SumOfUs

European organisations

ClientEarth
Climate Action Network (CAN) Europe
European Environmental Bureau (EEB)
European Public Service Union (EPSU)
Friends of the Earth Europe (FoEE)
The Green 10
Gastivists Collective
Seattle to Brussels Network
We Move Europe

Organisations from ECT signatory states

Austria: Anders Handeln; GLOBAL 2000 - Friends of the Earth Austria; Austrian Trade Union Confederation (ÖGB); Attac Austria; KABÖ; AK EUROPA; younion _ Die Daseinsgewerkschaft; Welthaus Wien; WIDE; Gewerkschaft PROGE; NFI; Welthaus der Diözese Innsbruck; Future Aid - Die Zukunft braucht unsere Hilfe!; Center for Encounter and Active Non-Violence; Netzwerk Soziale Verantwortung; Grüne Bildungswerkstatt NÖ; Gemeinwohlökonomie Steiermark; Vienna Institute for International Development and Cooperation (VIDC); Allianz gerechtes Handeln; DKA Austria

Belgium: ACV-CSC; Entraide et Fraternité; 11.11.11; Corporate Europe Observatory (CEO); CNCD - 11.11.11 (Centre National de Coopération au Développement); Mouvement Ouvrier Chrétien; Climat et Justice Sociale (CJS); Kairos Europe (Wallonie/Bruxelles); Broederlijk Delen; Arbeid & Milieu; Grands-Parents pour le Climat; Ecokerk; 11 March Movement; Climate Express; Workers4Climate; Réseau wallon pour l'accès durable à l'énergie (RWAE); ATTAC Wallonie Bruxelles; Food & Water Action Europe; ATB De Natuurvrienden

Bosnia and Herzegovina: Centar za životnu sredinu - Friends of the Earth Bosnia and Herzegovina; Green team Novi Grad; LIR Evolution

Bulgaria: Foundation for Environment and Agriculture

Croatia: Friends of the Earth Croatia

Cyprus: Friends of the Earth Cyprus

Denmark: Global Aktion; NOAH - Friends of the Earth Denmark; 3F BJMF

Estonia: Estonian Green Movement

Finland: TTIP Network Finland; The Finish Association for Nature Conservation; Maan ystävät ry - Friends of the Earth Finland; 350 Finland; EKOenergy

France: Veblen Institute; AITEC; Attac France; Amis de la Terre France; CCFD – Terre Solidaire; ActionAid France - Peuples Solidaires; Sherpa; Confédération paysanne; Collectif Stop TAFTA/CETA; Fondation Nicolas Hulot; Notre affaire à tous; Réseau Foi et Justice Afrique Europe Antenne France; Sciences Citoyennes; Emmaüs International; Fédération Droit Au Logement (DAL); Collectif Causse Méjean - Gaz de Schiste NON !; BLOOM; France Nature Environnement; Alofa Tuvalu; Fondation Copernic; Comité Pauvreté et Politique; Alternatives et Autogestion; Fédération Artisans du Monde; SdN75

Germany: Klima-Allianz Deutschland; Forum Umwelt und Entwicklung / German NGO Forum on Environment and Development; WEED - World Economy, Ecology & Development; urgewald; LobbyControl; Attac Germany; PowerShift; BUND - Friends of the Earth Germany; Berliner Wassertisch; FDCL - Center for Research and Documentation Chile-Latin America; Arbeitsgemeinschaft bäuerliche Landwirtschaft (AbL); Campact; FIAN Deutschland; AntiAtomBonn; Andy Gheorghiu Consulting; NaturFreunde Deutschlands – Naturefriends Germany; IPPNW Germany; Aktionsbuendnis Energiewende Heilbronn

Greece: Naturefriends Greece; OIKOPOLIS; ECOELEUSIS; PERI.POL.O. of Attica

Hungary: WWF Hungary; National Society of Conservationists - Friends of the Earth Hungary; Védjegylet; Éghajlatvédelmi Szövetség (Hungarian Climate Alliance); Hungarian PV and Solar Collector Association - MNNSZ; Ökorégió Alapítvány a Fenn tartható Fejlődésért; Kalocsakörnyéki Környezetvédelmi Egyesület; Fauna Alapítvány; Kalocsakörnyéki Környezetvédelmi Egyesület; Zöld Akció Egyesület (Green Action); ZÖLD KÖR; "Bihar" Kis-sárréti Civilek Társasága; Clean Air Action Group; Csalán Környezet és Természetvédő Egyesület; Mozgalom az Egészséges Város Környezetéért Civil Társaság; Towards Sustainability Association; BME EZK; Tree of Life Organization; CSEMETE Természet- és Környezetvédelmi Egyesület; GATE Green Club NGO; Ökotárs Alapítvány; Hungarian Society for Environmental Education;

Ireland: Irish Environmental Network & Green Foundation Ireland; Extinction Rebellion Ireland; Trócaire; Keep Ireland Fracking Free; FÍS NUA; Climate Change Ireland; ATTAC Ireland; Good Energies Alliance Ireland; Extinction Rebellion Kildare (XRK); Futureproof Clare; Action from Ireland (Afri); Not Here, Not Anywhere; An Taisce (Climate Committee); Feasta: the Foundation for the Economics of Sustainability; An Cláíomh Glas; Social Justice Ireland

Kazakhstan: Feminist League

Luxembourg: Mouvement Ecologique

Malta: Friends of the Earth Malta

The Netherlands: The Transnational Institute (TNI); Milieudefensie - Friends of the Earth Netherlands; SOMO; Fossielvrij NL; FNV klimaatwerkgroep; WILPF NL Women's International League for Peace and Freedom; Natuur & Milieu; Both ENDS; Nivon Natuurvrienden

Norway: Spire; Attac Norway

Poland: Rozruch; Instytut Globalnej Odpowiedzialności (IGO); Fundacja "Rozwój TAK - Odkrywki NIE"; Polish Institute for Human Rights and Business

Portugal: TROCA - Plataforma por um Comércio Internacional Justo; ZERO - Association for the Sustainability of the Earth System; SOS Racismo; GasNaturalNao; Palombar - Associação de conservação da Natureza e do Património Rural; Corporations- Zero Tolerance; Fruta Freia; Vamos Salvar o Jamor; GAIA-Environmental Action and Intervention Group

Romania: Ecoteca Association; Bankwatch Romania; TERRA Mileniul III; Eco V Natura

Slovenia: Focus Association for Sustainable Development; Umanotera

Spain: Confederación General del Trabajo (CGT-España); Ecologistas en Acción; Amigos de la Tierra - Friends of the Earth Spain; ATTAC España; Des de Baix; Catalunya No als Tractats de Comerç i Inversió; Entrepueblos-Entrepobles-Entrepobos-Herriarte; Alternative Republicana; Diputada Asamblea de extremadura (Unidas por Extremadura) Extremeños; eco-union; Amigos de la Tierra Comunidad de Madrid; Observatori DESC; Solidaridad Internacional Andalu cis; Unión Sindical Obrera (USO); Ecologistas en Acción de Sanlúcar; Izquierda Unida; Debt Observatory in Globalisation (ODG); NO TTIP-CETA-TISA tARRAGONA-RE-US; 24877360p; Enginyeria Sense Fronteres; Plataforma Ciudadana Zaragoza sin Fractura; Asociación de Cultura Popular Alaborada - Gallur; Plataforma por un Nuevo Modelo Energético; Ong AFRICANDO; Confederación Intersindical; Intersindical Valenciana

Basque Country: ELA

Sweden: Swedish Society for Nature Conversation; Jordens Vänner - Friends of the Earth Sweden; Skiftet; latinamerikagrupperna

Switzerland: Alliance Sud; Public Eye; Pro Natura; Campax

The UK: Trade Justice Movement; UNISON - the public service union; Global Justice Now; War on Want; Traidcraft Exchange; Wen (Women's Environmental Network); Global Justice Glasgow; One World Week; Health Poverty Action; Common Weal; PCS;UK, UNISON Scotland; Rethinking Value Chains; Friends of the Earth England, Wales and Northern Ireland; CORE Coalition; One Planet Limited; The SANE Collective; Carbon Tracker Initiative

Ukraine: Ecoaction

Organisations from ECT observer countries

Australia: Australian Fair Trade and Investment Network; National Toxics Network; Climate Justice Union WA

Canada: Canadian Union of Public Employees (CUPE); Climate Emergency Institute; Stand.Earth

The Gambia: Janjanbureh Uniting Sustainable Tourism and Community Training (JustAct)

Indonesia: WALHI - Friends of the Earth Indonesia

Italy: Stop TTIP Italia; Fairwatch; Gruppo Italiano Amici della Natura; Esperanta Civito / Cité espérantienne; Fondazione Punto Sud

Nigeria: Foundation for the Conservation of the Earth (FOCONE); Automobile, Boatyards, Transport, Equipment and Allied Senior Staff Association

Senegal: Lumiere Synergie Developpement; Association Sénégalaise des Amis de la Nature (ASAN)

Uganda: Seatini Uganda; Friends with Environment in Development

USA: FracDallas; ClimateJobsPDX; Labor Council for Latin American Advancement - NYC; 350 New Orleans

Organisations from other countries

Argentina: INPADE / FOCO

El Salvador: CESTA

Ghana: Public Utility Workers Union of TUC-Ghana

Guinee: Federation Nationale des Travailleurs de Guinée

India: RITES Forum

Mozambique: Justiça Ambiental - Friends of the Earth Mozambique

Thailand: Manushya Foundation

Thailand/Philippines/India: Focus on the Global South

Togo: Les Amis de la Terre Togo – Friends of the Earth Togo; Jeunes volontaires pour l'environnement; Attac Togo

Uruguay: REDES - Friends of the Earth Uruguay

Endnotes

- 1 Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic (ICSID Case No. ARB/17/14). For more information on the case see: Friends of the Earth Europe and others (2019) *Dirty Oil Attacks on Action on Fossil Fuels: Rockhopper vs Italy*, June and the video *Dirty Oil vs Beautiful Abruzzo*, 25 June 2019.
- 2 For more information on the case see: Friends of the Earth Europe and others (2019) [Blocking Climate Change Laws with ISDS Threats: Vermilion vs France](#), June.
- 3 Edwin van der Schoot (2019) [Claim om kolenverbod voor Staat](#), De Telegraaf, 5 September.
- 4 Kyla Tienhaara and Christian Downie, *Risky Business* (2018) *The Energy Charter Treaty, Renewable Energy and Investor-State Disputes*, Global Governance, 24(3), 451-471; Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch (2019) [Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition, Transnational Dispute Management](#), February; Yamina Saheb (2019) [The Energy Charter Treaty \(ECT\). Assessing its geopolitical, climate and financial impacts](#), September.
- 5 See [Annex 1](#) to the report 'One Treaty to rule them all', sheet "amounts paid by states". A selectively updated version of this file from September 2019 is available on request.
- 6 In the ECT's non-discrimination clause (art. 10(7)) states promise to accord investments of ECT member states treatment no less favourable than that accorded to investors of the host state or any third state. While no such lawsuits are known to date, this could lead to ECT claims against policy measures that deliberately distinguish between energy investments that advance climate change mitigation objectives and those that hinder their achievement. See: Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch (2019) [Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition, Transnational Dispute Management](#), February, 22.
- 7 Sarah Keay-Bright (2019) "Outdated Energy Charter Treaty leaves new economy investments unprotected", *Energy Post*, 6 March; Yamina Saheb (2019) *The Energy Charter Treaty (ECT). Assessing its geopolitical, climate and financial impacts*, September, 8.
- 8 Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (ICSID Case No. ARB/09/6). For an analysis of the settlement see: Roda Verheyen (2012) [Briefing Note: The Coal-fired Power Plant Hamburg-Moorburg. ICSID proceedings by Vattenfall under the Energy Charter Treaty and the result for environmental standards](#), 11 April.
- 9 Vattenfall AB and others v. Federal Republic of Germany (ICSID Case No. ARB/12/12).
- 10 World Nuclear News (2019) *Aura seeks compensation for Swedish uranium ban*, 11 November.
- 11 AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Republic of Hungary (II) (ICSID Case No. ARB/07/22); Electrabel S.A. v. The Republic of Hungary (ICSID Case No. ARB/07/19); EVN AG v. Republic of Bulgaria (ICSID Case No. ARB/13/17); ENERGO-PRO a.s. v. Republic of Bulgaria (ICSID Case No. ARB/15/19); ČEZ, a.s. v. Republic of Bulgaria (ICSID Case No. ARB/16/24).
- 12 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. 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. 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. Albania settled the case in 2014 and agreed to pay €100 million in damages. See: [ČEZ \(Czech Republic\) v. Albania](#).
- 13 For more information on conflicts of interest and other rule of law problems with the ECT, see: Corporate Europe Observatory and Transnational Institute (2018) [One Treaty to Rule them All. The ever-expanding Energy Charter Treaty and the power it gives to corporations to halt the energy transition](#), June, chapter 3.3 and page 72.
- 14 Kyla Tienhaara and Christian Downie, *Risky Business* (2018) *The Energy Charter Treaty, Renewable Energy and Investor-State Disputes*, Global Governance, 24(3), 451-471, 451.
- 15 Council of the European Union (2019) [Negotiating Directives for the Modernisation of the Energy Charter Treaty](#), 2 July.
- 16 In its contribution to the modernisation process, Japan, for example, stated "that it is not necessary to amend the current ECT provisions". See: Energy Charter Secretariat (2019) [Policy Options for Modernisation of the ECT](#), 6 October.