



Adviesraad inzake beleidscoherentie  
ten gunste van ontwikkeling  
Conseil consultatif sur la cohérence  
des politiques en faveur du développement

Opinion of the Belgian Advisory Council on Policy Coherence for Development

# Overcoming inconsistencies between the Energy Charter Treaty and multilateral agreements in favour of development<sup>1</sup>

## 1. Introduction

01. This opinion concerns decisions to be made before the important deadline of June 2022 in the context of the ongoing renegotiation process of the Energy Charter Treaty (ECT) that was concluded in the 1990s. This deadline is an opportunity to overcome the inconsistencies of the ECT with European law and a series of inconsistencies with more recent political agreements. These agreements include the 2030 Agenda for Sustainable Development adopted by the United Nations, the Paris Agreement on Climate Change adopted by the 196 Parties of the COP21 and the series of initiatives for the European Green Deal taken to help the European Union (EU) achieve the development objectives of these agreements by 2030 and 2050. The implementation of these commitments would make trade a coherent instrument for sustainable development, as trade policy choices are no longer limited to the alternative of favouring free trade or protectionist withdrawal.

02. Signed in 1994, notably by the EU and its Member States and candidate countries as well as by former Soviet bloc countries, and entering into force in 1998, the ECT is a plurilateral agreement establishing a framework for trade and investment in the energy sector. It applies to all economic activities within the energy sector, from exploration and commercialisation to the trade and transport of energy materials. Some provisions of the ECT, such as the guarantees for trade and transport infrastructure, are more detailed and clearer than those proffered by the rules of the World Trade Organisation (WTO)<sup>2</sup>. Originally promoted by the EU to secure its energy supply due to concerns about the collapse of the USSR and the Gulf War<sup>3</sup>, the treaty now has 54 signatories. The EU and its Member States (except Italy that unilaterally withdrew in 2016) represents almost half of the signatories<sup>4</sup>. Seven Member States (France, Spain, Poland, Greece, Latvia, Hungary and Cyprus) have already announced

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<sup>1</sup> This opinion was drafted before the Russian invasion of Ukraine.

<sup>2</sup> See chapter 2.1.

<sup>3</sup> J. Doré, "Negotiating the Energy Charter Treaty", in T. W. Wälde (dir.), *The Energy Charter Treaty – An East-West Gateway for Investment & Trade*, The Hague, Kluwer Law International, 1996, pp. 138-139.

<sup>4</sup> Full list of signatories: <https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/>.

their intention to leave the ECT if the reforms fail and have asked the Commission for a legal assessment of a coordinated EU-wide withdrawal<sup>5</sup>.

03. A modernisation process of the ECT has been carried out every five years since 1999, without the obligation of achieving results. The most recent process began after the adoption of the list of topics open for review<sup>6</sup> (end of 2018) and issues of rules of procedure to follow during negotiations (mandate, timing, etc., end of 2019)<sup>7</sup>. Eleven negotiation cycles took place between July 2020 and March 2022. This process provided the opportunity to make the treaty compatible with international sustainable development commitments and to get rid of its anachronistic aspects. The will of States to use the ECT to secure conventional energy investments (2.1) actually backfired as soon as they began to pursue sustainable energy (2.2) and social (2.3) policies, to the point that the ECT became an instrument that protected unsustainable policies (2.4). Therefore, this opinion will examine (2.5) this opportunity to make the ECT compatible with the current pro-development policies, mainly by avoiding imposing agreement models on developing countries that are anachronistic and incompatible with European law.

04. These issues of coherence in terms of energy trade and investment as well as world trade as presented in Point 2 serve as the basis for the recommendations of the CCPD-ABCO (Belgian Advisory Council on Policy Coherence for Development) listed in Point 3 and justified in Point 4. This document is therefore a summary of the reasons why it is preferable for Belgium, as well as the European Union (EU) and other Member States, to consider withdrawing from the ECT now, while trying to limit the effects of the Treaty after withdrawal.

## 2. The problem of coherence with development issues

### 2.1. The evolution of the risks covered by the ECT

05. The ECT is a treaty that contributes above all to securing the supply of energy materials for EU countries, including Belgium. Its provisions on trade and transport (Article 7) go further than the rules of the World Trade Organisation by offering greater security of supply and prices<sup>8</sup>. The ECT stipulates that a contracting party cannot use taxation on – or prevent the maintenance of – trade/transport infrastructure to limit the supply of energy materials<sup>9</sup>.

06. The original objective of the ECT was to effectively benefit from a major international agreement to protect investments in the energy sector, particularly those of European companies in former Soviet States where legal systems were lacking. For this reason, the treaty contains an ISDS (Investor-to-State Dispute Settlement) clause. This mechanism (Article 26) allows a foreign investor to take a State to a

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<sup>5</sup> M. Peigné, H. Schumann and N. Schmidt, “Energy Charter Treaty: stalled reform fuels EU fears for climate”, Investigate Europe, 14 December 2021: <https://www.investigate-europe.eu/fr/2021/traite-charte-energie-stagne-angoisse-monte/>.

<sup>6</sup> Energy Charter Secretariat, *Modernisation of the Energy Charter Treaty*, Brussels, 28 November 2018: <https://www.energychartertreaty.org/fileadmin/DocumentsMedia/CCDECS/2017/CCDEC201723.pdf>.

<sup>7</sup> Energy Charter Secretariat, *Adoption by Correspondence – Modernisation of the Energy Charter Treaty: Mandate, Procedural Issues and Timeline for Negotiations*, Brussels, 6 November 2019: [https://www.energychartertreaty.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201910\\_-\\_STR\\_Modernisation\\_Mandate\\_Procedural\\_Issues\\_and\\_Timeline\\_for\\_Negotiations.pdf](https://www.energychartertreaty.org/fileadmin/DocumentsMedia/CCDECS/CCDEC201910_-_STR_Modernisation_Mandate_Procedural_Issues_and_Timeline_for_Negotiations.pdf).

<sup>8</sup> “Transit provisions are regulated both in Art. 7 ECT and in WTO law in Art V GATT and in the GATS with regard to energy transport-related services. Overall, it can be said that the transit regulations in the ECT have certain advantages over those of the GATT due to their more detailed and clearer formulation”. Austrian Federal Chamber of Labour, “The Energy Charter Treaty: No significant advantages for Contracting Parties”, *Policy Brief*, January 2022, p. 3: [https://www.akeuropa.eu/sites/default/files/2022-01/PB\\_EnergyCharterTreaty\\_0.pdf](https://www.akeuropa.eu/sites/default/files/2022-01/PB_EnergyCharterTreaty_0.pdf).

<sup>9</sup> See <https://www.energychartertreaty.org/Flipbook//files/assets/common/downloads/publication.pdf>.

private arbitration tribunal to contest, not only direct expropriations (i.e., arbitrary nationalisations), but also indirect expropriations (i.e., laws of public interest that undermine the sustainability of the investments made and reduce the profits expected at the time of investment<sup>10</sup>).

07. Indirect expropriation, which can result from any kind of measure (social, environmental, health, etc.) made by a State in the context of the regulation of economic activities being carried out on its territory<sup>11</sup>, is one of the main breaches alleged by claimants on the legal basis of the ECT (Article 13§1) and actually ascertained by arbitration tribunals<sup>12</sup>. Moreover, there has been a general trend in recent years towards a rapid increase in damages awarded by arbitration tribunals to investors wronged in this way<sup>13</sup>.

## 2.2. Investment protection in the ECT, a deterrent or even punitive instrument for sustainable energy policies

08. However, the energy situation has changed considerably over the last few years. So much so that the provisions of the ECT on ISDS now seem anachronistic, even inconsistent, with the Sustainable Development Goals (SDGs) of the 2030 Agenda. For energy policies, the latter includes, in particular, SDG 7 for access to clean affordable energy for all, as well as SDG 13 for combating climate change and its impacts.

09. With regards to the Paris Climate Agreement (2015), it made the EU clarify its 2050 neutrality target within the framework of the European Green Deal (2019) by demanding that “A power sector must be developed that is based largely on renewable sources, complemented by the rapid phasing out of coal and decarbonising gas”<sup>14</sup>. This call for a paradigm shift in global energy production is also supported by other international institutions. The same goes for the International Energy Agency which, since 2012, has stated that 80% of fossil fuels should remain underground<sup>15</sup>.

10. The Paris Agreement saw the dawn of a new era of global commitment to decarbonising the economy. Yet, the ECT allows investors to sue States that want to stop using fossil fuels. By continuing to protect investments in the fossil fuel sector, the ECT is thereby incompatible with these international commitments. Companies and investment funds operating in the energy sector use this treaty as both a deterrent and a punitive instrument<sup>16</sup>.

11. In terms of a deterrent instrument, on the one hand, the ECT allows energy companies to incite States to continue using fossil fuels by threatening them with legal action before an arbitration tribunal. Several European States have been forced to lower their climate objectives. For example, in 2009 Germany was sued by the Swedish company Vattenfall, claiming 1.4 billion euros for damages

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<sup>10</sup> S. Wintgens, “Traité sur la Charte de l’énergie: nos Etats en danger”, CNCD-11.11.11, 2 June 2020:

<https://www.cncd.be/traite-charte-energie-etats-danger-cas-italie-espagne-bosnie>.

<sup>11</sup> S. H. Nikièma, *L’expropriation indirecte en droit international des investissements*, Genève, Graduate Institute Publications, 2012, pp. 1-12.

<sup>12</sup> For statistics, see <https://www.energychartertreaty.org/cases/statistics/>.

<sup>13</sup> T. Marzal, “Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS”, *The Journal of World Investment & Trade*, vol. 22, n°2, 22 April 2021.

<sup>14</sup> European Commission, “The European Green Deal”, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions*, COM (2019) 640 final, Brussels, 11 December 2019, p. 6.

<sup>15</sup> International Energy Agency, *World Energy Outlook 2012*, 12 November 2012.

<sup>16</sup> P. Eberhardt, C. Olivet and L. Steinfort, *One Treaty to Rule Them All*, Corporate Europe Observatory & Transnational Institute, Brussels/Amsterdam, June 2018.

caused by delays in the approval of a coal-fired power plant. In order to avoid paying the amount, the German government agreed to lower its environmental standards for the plant concerned<sup>17,18</sup>.

12. In terms of a punitive instrument, on the other hand, the ECT allows energy companies to claim financial compensation from States that opt for a transition towards a zero-carbon economy and thereby jeopardise the value of their investments in fossil fuels. Based on foreign investments made in the signatory countries of the treaty up until January 2020, the amount of these potentially “stranded assets” is estimated at 879 billion euros and could reach the colossal amount of 2.15 trillion euros by 2050 if the ECT continues to protect fossil fuels<sup>19</sup>. This treaty has thereby become the preferred tool for fossil fuel companies<sup>20</sup> to transfer the costs of these stranded but protected assets to European taxpayers<sup>21</sup>. But development policies relating to fossil fuels are not the only sustainable energy policies being targeted. Following the government’s decision to shut down all nuclear power plants by the end of 2022, the German government had to pay damages of 2.4 billion euros to several energy companies<sup>22</sup> to end arbitration proceedings brought against it.

### 2.3. The ECT as a deterrent to sustainable social policies

13. The ECT is also used to dissuade or block decisions made by public authorities aiming to regulate energy prices, particularly electricity, to benefit consumers<sup>23</sup>. Hungary, for example, was taken to court in 2007 by the electricity company Electrabel<sup>24</sup>, following a law designed to reintroduce regulated prices (after having removed them under liberalisation) in order to reduce the electricity bills of less well-off households. In order to be compatible with supranational commitments inviting States to combat energy poverty<sup>25</sup> and so as not to act as a brake on the fight against energy poverty (SDG 7), the ECT must exclude the protection of existing and future investments in energy sectors.

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<sup>17</sup> ISDS Platform, “ISDS Corporate Attacks. Case study: Vattenfall v. Germany”, 25 July 2015.

<sup>18</sup> In France, the bill to end the exploitation of hydrocarbons by 2040 was abandoned in 2017 after the Canadian company Vermillion threatened to use the ECT to bring an arbitration case against the French state. M. Vaudano, “Comment la menace d’arbitrage a permis aux lobbys de détricoter la loi Hulot”, *Le Monde*, 4 September 2018.

<sup>19</sup> Y. Saheb, “Modernisation of the Energy Charter Treaty. A Global Tragedy at a High Cost for Taxpayers”, Paris, OpenExp, January 2020.

<sup>20</sup> After examining 231 known arbitration cases linked to fossil fuels (which represent 20% of all known ISDS cases across all sectors), a recent report shows how the fossil fuel industry has made extensive use of the ISDS system to protect its investments, creating a major obstacle for countries trying to phase out fossil fuels and combat climate change. Lea Di Salvator, *Investor–State Disputes in the Fossil Fuel Industry*, Manitoba, International Institute for Sustainable Development, December 2021: <https://www.iisd.org/system/files/2022-01/investor-state-disputes-fossil-fuel-industry.pdf>.

<sup>21</sup> This is the case of the German companies RWE (RWE AG and RWE Eemshaven Holding II B.V. v. Netherlands, ICSID Case No. ARB/21/4) and Uniper (Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Netherlands, ICSID Case No. ARB/21/22): they brought an arbitration case against the Netherlands in 2021 and, using the ECT, are demanding financial compensation of 1 and 1.4 billion euros respectively, after the vote in December 2019 on a bill aiming to ban coal-fired power generation by 2030.

<sup>22</sup> The four operators concerned are EON, RWE, Vattenfall and EnBW. “Sortie du nucléaire: Berlin va verser 2,4 milliards d’euros d’indemnités aux énergéticiens”, *France24*, 5 March 2021: <https://www.france24.com/fr/info-en-continu/20210305-sortie-du-nucléaire-berlin-va-verser-2-4-milliards-d-euros-d-indemnités-aux-énergéticiens>.

<sup>23</sup> I. Franck, “Accès à l’énergie : droits humains contre droit au profit?”, Brussels, Entraide & Fraternité, 2019, p. 8.

<sup>24</sup> Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19.

<sup>25</sup> An example is the European Parliament Resolution of 26 May 2016 on Delivering a new deal for energy consumers (2015/2323(INI)).

## 2.4. The evolution of energy policies supported by the ECT

14. The ECT thus protects investments for all forms of energy, including nuclear and renewable energies<sup>26</sup>, but, above all, it allows energy companies to demand significant damages from States that decide to regulate the development of energy production on their own soil. This is how the sum of greenhouse gas emissions protected by the ECT since its entry into force in 1998 is, for example, greater than the EU's carbon budget for the 2018-2050 period<sup>27</sup>.

15. Moreover, the EU is exporting this anachronistic model agreement to developing countries. The withdrawal of Russia in 2010 effectively redirected the ECT's objectives<sup>28</sup>. The EU initiated a modernisation process of the treaty aiming to compensate for the departure of its main supplier of fossil fuels by allowing other producer countries to join. A global expansion strategy (called "CONEXO"), mainly financed by European funds for cooperation with developing countries, has been rolled out since 2012 with the aim of expanding the ECT to countries in Africa, Asia, the Middle East, and Latin America, all considered as key partners for the EU in terms of energy supply<sup>29</sup>.

16. To date, Yemen, Jordan, and Montenegro have joined the ECT. But African States seem to be the main target of this expansion policy: some thirty developing countries and four African organisations are currently in the accession process<sup>30</sup>. Joining this treaty may appear to have advantages for a producer country like Nigeria that wants to attract foreign investors to develop its energy infrastructure, or for a transit country like Morocco that wants to boost its strategic position<sup>31</sup>. Increasing the stability of demand for energy exporting countries is one of the arguments put forward by the General Secretariat of the ECT to attract new members<sup>32</sup>.

## 2.5. An opportunity to make the ECT compatible with pro-development policies

17. On 2 July 2019, the EU Member States gave the European Commission a mandate to modify the ECT in order to align it with new international agreements, including the Paris Climate Agreement<sup>33</sup>. In July 2020, they agreed to the Commission's proposals to modernise the ECT, aiming, on the one hand,

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<sup>26</sup> Spain, for example, has been the target of almost fifty complaints for more than 8 billion euros after modifying its support scheme for solar energy investments following the austerity policies introduced after the 2008 crisis. See <https://www.energychartertreaty.org/cases/statistics/>.

<sup>27</sup> Y. Saheb, "Modernisation of the Energy Charter Treaty. A Global Tragedy at a High Cost for Taxpayers", *op. cit.*

<sup>28</sup> E. Bonafé and F. Encke, "Energy Community Treaty and Energy Charter Treaty: Working towards Efficient International Energy Markets", in D. Buschle and K. Talus (dir.), *The Energy Community: A New Energy Governance System*, Cambridge, Intersentia, 2015, pp. 539-549.

<sup>29</sup> N. Bernasconi-Osterwalder, "L'élargissement de la Charte de l'Énergie à l'Afrique et à l'Asie : défaire la réforme du droit international de l'investissement?", *Investment Treaty News*, 12 June 2017:

<https://www.iisd.org/itn/fr/2017/06/12/expansion-energy-charter-ect-africa-asia-undoing-reform-international-investment-law-nathalie-bernasconi-osterwalder/>.

<sup>30</sup> According to the 2021 Annual Report of the Charter of the ECT, the budget allocated to expansion activities is the same for 2022 as it was for the previous year, i.e., around 400,000€ (11% of the total budget of the Secretariat). These activities concern, in particular, the completion of the accession process of Kenya, Tanzania, Benin, Panama, Colombia, Cambodia and Indonesia as well as outreach to Uganda, Pakistan, Mauritania, Eswatini and Burundi. IEC, *International Energy Charter Annual Report 2021*, Brussels, December 2021:

[https://www.energycharter.org/fileadmin/ImagesMedia/Newsletter/Annual\\_Report\\_2021.pdf](https://www.energycharter.org/fileadmin/ImagesMedia/Newsletter/Annual_Report_2021.pdf).

<sup>31</sup> S. Wintgens, "Investissement et climat: réformer le Traité sur la Charte de l'énergie", *Note politique*, n°27, May 2020: <https://www.cncd.be/note-politique-cncd-11-11-11-reformer-traite-charte-energie>.

<sup>32</sup> K. Beckman, "Interview: A new Energy Charter Treaty as a complement to the Paris Agreement", *Borderlex*, 18 June 2020: <https://borderlex.net/2020/06/18/interview-a-new-energy-charter-treaty-as-a-complement-to-the-paris-agreement-on-climate-change/>.

<sup>33</sup> European Council, Negotiating Directives for the Modernisation of the Energy Charter Treaty - Adoption, Brussels, 2 July 2019, p. 3: <https://data.consilium.europa.eu/doc/document/ST-10745-2019-ADD-1/en/pdf>.

to respect international treaties like the Paris Climate Agreement or the conventions of the International Labour Organisation (ILO) and, on the other hand, the modernisation of the ISDS clause<sup>34</sup>. In this regard, the amendment proposed by the Commission to Article 26 of the ECT aimed to align the treaty with European law by providing for alternatives to the ISDS. For several years now, the European Commission has been trying to replace the ISDS with a new “more transparent and impartial” mechanism<sup>35</sup>: called the ICS (Investment Court System). This new mechanism was included for the first time in 2016 in the CETA and then in the agreements with Singapore and Vietnam. Over time, the EU hopes to turn it into a Multilateral Investment Court<sup>36</sup>. It should be noted that a process of Investor-State Dispute Settlement reform is also underway in the framework of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL), although these two processes are not directly linked<sup>37</sup>.

18. However, the review of the ISDS mechanism was not included in the topics negotiated by the ECT Signatory States, particularly because Japan vetoed it<sup>38</sup>. Unable to reform the dispute settlement clause, the EU then tried to limit its scope by amending the definition of economic activities in the energy sector in order to redefine types of activities protected by the treaty and to phase out fossil fuels. To this end, in February 2021, the European Commission proposed a transition phase allowing for the protection of existing investments in fossil fuels for an additional ten years, as well as investments in gas-fired power plants until 31 December 2030, and investments in coal-fired power plants converted to gas, and new investments in gas pipelines until 2040<sup>39</sup>. Although more ambitious than other proposals made by ECT members, the EU’s proposed review still falls short of its stated objectives as it is still not totally ending the protection of existing and future investments in fossil fuels, as called for by the European Parliament in October 2020<sup>40</sup>.

19. Any ECT amendments require unanimous approval from all signatory States (Articles 36 §1 (a) and 42). Yet, many of them such as Japan, as well as Azerbaijan, Turkmenistan, Kazakhstan, Mongolia, and Uzbekistan that are strongly dependent on fossil fuel revenues, have expressed their wish to maintain the status quo. As a result, it is very unlikely that the ongoing modernisation process will achieve satisfactory results.

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<sup>34</sup> European Commission, *EU text proposal for the modernisation of the Energy Charter Treaty (ECT)*, May 2020:

[https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc\\_158754.pdf](https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf).

<sup>35</sup> European Commission, *Multilateral reform of investment dispute resolution*, Brussels, 13 September 2017, p. 25:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0302&from=LV>.

<sup>36</sup> Unlike the ISDS, the ICS is a public court with judges selected from a pool of permanent members, which allows for appeals and reduces to “rare circumstances” the possibility for foreign investors to invoke indirect expropriation to bring an arbitration case against a State, although some room for interpretation is left to the arbitrators. Arnaud Zacharie, *Refonder le commerce mondial. Du libre-échange à l’échange durable*, Brussels, Centre d’action laïque, coll. “Liberté j’écris ton nom”, 2021, pp. 70-71.

<sup>37</sup> UNCITRAL, Working Group III: Investor-State Dispute Settlement Reform. Status of work, November 2021:

[https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>38</sup> Energy Charter Secretariat, *Adoption by Correspondence – Policy Options for Modernisation of the ECT*, Brussels, 6 October 2019, p. 3: <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf#page=3>.

<sup>39</sup> European Commission, *EU additional submission to its text proposal for the modernisation of the Energy Charter Treaty*, February 2021: [https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc\\_159436.pdf](https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159436.pdf).

<sup>40</sup> In October 2020, the European Parliament adopted an amendment to the European Climate Law mandating the EU to end the protection of fossil fuel investments within the framework of modernising the ECT.

See [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0253\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0253_EN.html).

### 3. Recommendations

#### 20. Bring the ECT into line with the 2050 carbon-neutrality goal:

- Remove the legal protection of investments that hinder the energy transition towards carbon neutrality and public energy policies, particularly the control of electricity prices and the establishment of public clusters.
- Exclude from the ECT any protection of existing and future investments in fossil fuels.

#### 21. Reform the Investor-State Dispute Settlement mechanism:

- Limit the scope of arbitration tribunals to direct expropriations.
- Give preference to recourse to national jurisdictions.
- Guarantee the highest standards of independence and impartiality of judges.

#### In the absence of profound reform on the points above-mentioned before June 2022:

#### 22. Collectively withdraw from the ECT by neutralising the sunset clause of the ISDS and ensuring energy supply and employment guarantees:

- Work towards a coordinated and joint withdrawal from the ECT, as proposed by other Member States.
- Accompany this collective withdrawal of the EU and its Member States with an *inter se* agreement neutralising the ISDS.
- Ensure the necessary guarantees for energy supply (security of transport/trade, financial supply, and accessibility for the industry) and employment (protect and promote employment and good working conditions) in all sectors affected by this withdrawal.

#### 23. Avoid exporting the ECT to developing countries:

- Freeze all accession processes while this agreement remains anachronistic and incompatible with European law.

### 4. Justifications of the recommendations

#### Bring the ECT into line with the 2050 carbon-neutrality goal (point 20):

24. The EU's unambitious phasing-out reform proposal provides for the continued protection of existing investments and certain future investments in fossil fuels; this is the case for gas, considered as an essential alternative energy source in the political context of nuclear energy phase-out policies<sup>41</sup>. Foreign investments in electricity produced by gas-fired power plants thereby continue to be protected until 2040 if the emissions from the electricity produced by these power plants does not exceed 550gCO<sub>2</sub>/kWh. However, this limit is more than five times higher than the 100gCO<sub>2</sub>/kWh proposed

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<sup>41</sup> At the beginning of February 2022, the European Commission proposed including natural gas in the EU green taxonomy, considering this CO<sub>2</sub>-emitting energy source as a means of facilitating the energy transition. Frédéric Simon, "EU puts green label for nuclear and gas officially on the table", *EURACTIV.com*, 3 February 2022: <https://www.euractiv.com/section/energy-environment/news/eu-puts-green-label-for-nuclear-and-gas-officially-on-the-table/>.

for the implementation of a European regulation on establishing a framework to facilitate sustainable investment<sup>42</sup>.

25. If fossil fuels are not excluded from the ECT, these protected emissions will represent one third of the global carbon budget by 2050 to limit the global temperature increase to 1.5 degrees<sup>43</sup>. Consequently, getting the ECT into step with the energy transition towards carbon neutrality means the removal of all provisions in Part III of the treaty that promote and protect investments in fossil fuels.

#### **Reform the Investor-State Dispute Settlement mechanism (point 21):**

26. With more than 145 known cases to date<sup>44</sup>, the ECT has become the investment agreement generating the most investor-state disputes in the world. However, private arbitration tribunals have a bias towards investors to the detriment of public interest norms and have used “a risk-free investment logic”<sup>45</sup>. The vague concept of indirect expropriation allows investors to consider a reduction in the price of electricity, the application of social tariffs or the protection of natural reserves as a reduction in the profits that they expected at the time of their investment.

27. This system has come under increasing criticism<sup>46</sup>, from both developing countries as well as developed countries. The United States and Canada ended the ISDS in their NAFTA review in 2018. The European Commission decided to replace the ISDS with the ICS (Investment Court System), included for the first time in the CETA.

28. While it is legitimate to protect investors from discriminatory measures and authoritarian expropriations, nothing can justify the rules favouring private interests that harm democratic choices in favour of public policies. Arbitration tribunals should be limited to only protecting investors from direct expropriations and should not under any circumstance allow an investor to invoke indirect expropriation as a reason to contest public interest laws<sup>47</sup>.

#### **Collectively withdraw from the ECT by neutralising the sunset clause of the ISDS and ensuring energy supply and employment guarantees (point 22):**

29. For lack of a profound reform, several solutions have been put forward to end this treaty for the public interest<sup>48</sup>. One of the options suggested is to definitively end this treaty. Terminating the ECT

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<sup>42</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, 18 June 2020: <https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32020R0852&from=EN..>

<sup>43</sup> Y. Saheb, “Modernisation of the Energy Charter Treaty. A Global Tragedy at a High Cost for Taxpayers”, *op. cit.*

<sup>44</sup> This includes known cases only, as investors are not required to disclose legal actions under the ECT. For more details regarding these cases, see <https://www.energychartertreaty.org/cases/list-of-cases/>.

<sup>45</sup> R. Beauchard, *L’assujettissement des nations. Controverse autour du règlement des différends entre Etats et investisseurs*, Paris, Editions Charles Léopold Mayer, 2017, p. 35.

<sup>46</sup> Y. Kyun Kim, “States Sued: Democracy, the Rule of Law, and Investor-State Dispute Settlement (ISDS)”, *International Interactions*, vol. 43, n°2, 2017, pp. 300-325; T. Dietz, M. Dotzauer and E. S. Cohen, “The legitimacy crisis of investor-state arbitration and the new EU investment court system”, *Review of International Political Economy*, vol. 26, n°4, 2019, pp. 749-772.

<sup>47</sup> A. Zacharie, *Refonder le commerce mondial. Du libre-échange à l’échange durable*, *op. cit.*, p. 70.

<sup>48</sup> M. Dietrich Brauch, “Should the European Union fix, leave or kill the Energy Charter Treaty?”, *Blog Droit Européen*, 9 February 2021: <https://blogdroiteuropeen.com/2021/02/09/should-the-european-union-fix-leave-or-kill-the-energy-charter-treaty-by-martin-dietrich-brauch/>.

requires, however, the consent of all the contracting parties<sup>49</sup>, which seems unlikely given the attachment of numerous countries to the treaty due to their high dependence on fossil fuel revenues.

30. Seeing as termination is not realistic, the best option for the EU and its Member States is to withdraw from the ECT, individually or together<sup>50</sup>. This was the solution adopted unilaterally by Italy in 2016 and supported by France, Spain, and Luxembourg in the event that the negotiations fail. However, it is not enough to leave the ECT to protect oneself from being sued. This treaty contains a survival clause (Sunset Clause) (Article 47) that extends the application of its provisions of investments made in the country pulling out of the treaty for a period of twenty years. In other words, this clause allows foreign investors to continue taking the State to court two decades after they have left the ECT. This was the case with Italy that was taken to court in 2017 by the British oil and gas company Rockhopper<sup>51</sup>, after it unilaterally left the ECT in 2016 after adopting a moratorium on fossil fuel investments close to Italian shores.

31. A collective withdrawal of the EU and its Member States from the ECT would therefore also require the superseding of the survival clause with an *inter se* agreement, which would deactivate the ISDS between the European States that have decided to withdraw from the ECT and to which non-EU Member States also wanting to withdraw from the treaty could also be invited to join<sup>52</sup>.

32. Particularly as intra-European disputes are illegal; it is in the EU's interest to be prepared to end this legal contradiction. The Court of Justice of the EU (CJEU) has already ruled several times on the incompatibility of the ISDS arbitration clause as it appears in the ECT with European law. In its opinion of 16 May 2017 relating to the EU-Singapore agreement (2/15), it stated that the EU does not have exclusive competence in resolving disputes between States and investors<sup>53</sup>. In the Achmea judgment handed down on 6 March 2018 (C-284/16), the court decreed that the ISDS clause of the treaty between the Netherlands and Slovakia was incompatible with European law because it had an adverse effect on the autonomy of EU law<sup>54</sup>. This is what led Belgium to refer to the CJEU in December 2020 to verify the legality of the ECT arbitration clause<sup>55</sup>. Meanwhile, in a ruling handed down on 2 September 2021 in response to a request for a preliminary ruling by the Paris Court of Appeal on the legality of the dispute between the Republic of Moldova and Komstroy Investment (C-741/19) on the legal basis of the ECT, the CJEU concluded once again that the ISDS arbitration clause (Article 26) was "not applicable" between a European investor and an EU Member State and that, consequently, it violated

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<sup>49</sup> In the absence of a termination clause in the ECT, its termination requires the "consent of all the parties after consultation with the other contracting States", in accordance with Article 54b of the Vienna Convention on the Law of Treaties: [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

<sup>50</sup> "All in all, the solution of the modification or the mutual termination of the ECT only among the EU Member States would have more immediate and certain effects". European Parliament, « Sunset Clauses in International Law and their Consequences for EU Law », Study Requested by the JURI Committee, January 2022, p. 62: [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703592/IPOL\\_STU%282022%29703592\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703592/IPOL_STU%282022%29703592_EN.pdf).

<sup>51</sup> Rockhopper Exploration Plc, Rockhopper Italia S.p.A. and Rockhopper Mediterranean Ltd v. Italy, ICSID Case No. ARB/17/14: <https://www.energychartertreaty.org/details/article/rockhopper-exploration-plc-rockhopper-italia-spa-and-rockhopper-mediterranean-ltd-v-italy-icsi/>.

<sup>52</sup> S. Wintgens, "Faire du Traité sur la Charte de l'énergie un accord plus vert(ueux): un jeu de dupes?", CNCD-11.11.11, 29 June 2021: <https://www.cncd.be/Faire-Traite-Charte-energie-accord-plus-vertueux-jeu-dupes>.

<sup>53</sup> CJEU, "The free trade agreement with Singapore cannot, in its current form, be concluded by the EU alone", Press release No 52/17, 16 May 2017: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-05/cp170052en.pdf>.

<sup>54</sup> CJEU, "The arbitration clause in the Agreement between the Netherlands and Slovakia on the protection of investments is not compatible with EU law", Press release No 26/18, 6 March 2018: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180026en.pdf>.

<sup>55</sup> SPF Foreign affairs, "Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty", 3 December 2020: <https://diplomatie.belgium.be/en/newsroom/nouvelles/2020/la-belgique-introduit-demande-avis-application-intra-europeenne-dispositions-arbitrales>.

EU law<sup>56</sup>. Private arbitration tribunals are not obliged to apply these rulings<sup>57</sup>, as illustrated by two cases recently brought to court based on the Komstroy ruling<sup>58</sup>.

33. The collective withdrawal of the EU and its Member States from the ECT would not, however, fix all the problems related to the need to secure Europe's affordable energy supply. It is therefore in the EU's interest to simultaneously set an example on the international stage by having a sustainable energy policy included in its trade, energy and industrial plans that is proactive and comprehensive within the framework of European strategic autonomy. Such a strategy would ensure affordable energy prices and would guarantee the security of energy transport and supply for consumers and industrial sectors. It will also be essential to ensure massive investments in energy efficiency and in all low-carbon energy carriers, along with sufficient financial resources to ensure a just transition. This should be done in a way that guarantees employment, good working conditions and workers' rights. Social dialogue and collective bargaining are key elements to successfully see this process through<sup>59</sup>.

### **Avoid exporting the ECT to developing countries (point 23):**

34. For developing countries, joining the ECT remains attractive even though it includes significant risks<sup>60</sup>. As members of the ECT they are exposed to a greater risk of being sued before private arbitration tribunals by foreign investors who feel that they have been wronged, particularly if they host controversial energy investment projects such as the trans-African gas pipeline project that aims to channel Nigerian gas to Europe via Morocco. The risk of lawsuits can dissuade these countries from adopting regulations that reduce the social and environmental costs of these projects to a minimum and to maximise the advantages for local populations. It can also prevent them from revoking failed privatisations<sup>61</sup>, or dissuade them from regulating energy investments (for example, regulations requiring investors to use the local labour force, process raw materials before exporting them, or even protect natural resources) in order to promote the country's development. The risk of lawsuits can also undermine efforts made to combat energy poverty in accordance with several sustainable development goals, through measures such as the capping or regulation of energy prices<sup>62</sup>. Generally

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<sup>56</sup> CJEU, "Reference for a preliminary ruling – Energy Charter Treaty – Article 26 – Inapplicability between Member States– Arbitration Award – Judicial review – Jurisdiction of a court of a Member State – Dispute between a third-State operator and a third State – Jurisdiction of the Court – Article 1(6) of the Energy Charter Treaty – Concept of 'investment'", Luxembourg, 2 September:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=245528&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=3161919>.

<sup>57</sup> S. Collins, "Moldova v Komstroy: A Moment Of Reckoning For Intra-EU Investment Arbitration Under The ECT? Considering Its Impact On Tribunals, Investors And EU Member States", *European Federation for Investment Law and Arbitration (EFILA) Blog*, 29 November 2021: <https://efilablog.org/2021/11/29/moldova-v-komstroy-a-moment-of-reckoning-for-intra-eu-investment-arbitration-under-the-ect-considering-its-impact-on-tribunals-investors-and-eu-member-states/>.

<sup>58</sup> D. Charlotin, "ICSID tribunal hearing claims by state-owned German banks against Spain declines to reconsider intra-EU decision in light of the CJEU's Komstroy Decision", *IAReporter*, 13 December 2021: <https://www.iareporter.com/articles/icsid-tribunal-hearing-claims-by-state-owned-german-banks-against-spain-declines-to-reconsider-intra-eu-decision-in-light-of-the-cjeus-komstroy-decision/>; D. Charlotin, "ICSID tribunal regrets clash between fundamental norms of EU law and ECT arbitration, but dismisses Spain's request to reopen intra-EU issue in view of Komstroy decision", *IAReporter*, 7 December 2021: <https://www.iareporter.com/articles/icsid-tribunal-regrets-clash-between-fundamental-norms-of-eu-law-and-ect-arbitration-but-dismisses-spains-request-to-reopen-intra-eu-issue-in-view-of-komstroy-decision/>.

<sup>59</sup> European Trade Union Confederation, *ETUC position on the Energy Charter Treaty*, 5 October 2021:

<https://www.etuc.org/en/document/position-de-la-ces-sur-le-traite-de-la-charte-sur-lenergie>.

<sup>60</sup> P. Eberhardt and C. Olivet, *Silent Expansion. Will the world's most dangerous investment treaty take the global south hostage?*, Brussels/Amsterdam/Kampala, CEO, TNI and Seatini, April 2020: [https://www.tni.org/files/publication-downloads/ect\\_silent\\_expansion.pdf](https://www.tni.org/files/publication-downloads/ect_silent_expansion.pdf).

<sup>61</sup> Like Albania, forced to pay 100 million euros for wanting to revoke electricity distribution permits from the Czech energy giant. *ČEZ v. The Republic of Albania*: <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/522/-ez-v-albania>.

<sup>62</sup> F. Lumonya, "THE ENERGY CHARTER TREATY (ECT) IS A DECOY: East African Community (EAC) countries should desist from acceding to it", Kampala, Southern and Eastern Africa Trade Information and Negotiations Institute (SEATINI) Uganda

speaking, the ECT can have an adverse effect on a developing country's capacity to regulate. It is therefore important to freeze all accession processes as long as the ECT remains anachronistic and incompatible with European law.

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and Transnational Institute (TNI), 8 December 2020: <https://seatiniuganda.org/download/the-energy-charter-treaty-ect-is-a-decoy-east-african-community-eac-countries-should-desist-from-acceding-to-it/>