

UNCTAD High Level IIA Conference
13 November 2019, Geneva
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Breakout Session: Multilateral Processes and their contribution to Phases 1 and 2 of SD-oriented IIA reforms “Preserving right to regulate, while providing protection”

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- thank you chair and thank you for the invitation
- focus my intervention on civil society concerns about the Energy Charter Treaty
- Why focus on the ECT?
 - the world’s most litigated investment agreement. No other treaty has led to more investor arbitrations against governments: 128 cases by October 2019
 - one of the largest investment agreements, applying to 50 states from Western and Eastern Europe, Central and Western Asia to Japan, plus Euratom (the European Atomic Energy Community) and the European Union (EU)
 - Many countries in Africa, the Middle East, Asia and Latin America in the process of signing on to this outdated and dangerous agreement from the 1990s
 - hope that intervention = also interesting for people in the room who do not come from one of the 50 member states of the ECT
- Share with you 5 civil society concerns about the ECT regarding right to regulate

1. The ECT could undermine climate action

- amongst others, the ECT protects fossil fuel investments (coal, gas and oil) and is already being used to challenge and undermine necessary climate action
- German company Uniper threatening to sue the Netherlands if the country approves a law to phase out coal-fired power plants by 2030 (€1bn claim)
- Italy is being sued over a ban on new oil and gas operations near the country’s coast (up to \$350 million in compensation)
- likely to see more ECT suits against climate action. Real risk that governments are discouraged from action when faced with risk of massive claims

2. The ECT can undermine environmental protection

- Swedish company Vattenfall’s €1.4 billion ECT legal attack from 2009 on environmental standards for a coal-fired power plant in Germany. Amount at stake forced local government

to weaken regulations and settle the case, exacerbating the impacts that the plant will have on local river and wildlife

3. ECT can be used to attack measures to make energy affordable and put it under public control

- Several Eastern European countries have been sued because they took steps to curb big energy's profits and lower electricity prices for consumers
- ECT provisions can also be used against initiatives to bring energy production and services under democratic control and reverse the negative impacts of failed energy privatisations

4. The ECT puts public budgets and taxpayers' money at incalculable risk

- Tribunals can force states to pay out billions to compensate investors, including for entirely hypothetical missed 'future profits' that are not compensable under national or EU law
- Under the ECT, governments have already been ordered or agreed to pay more than \$51.6 billion in damages from the public purse

5. As it stands now, the modernisation process is unlikely to fix these failures

- does not foresee an end to phase out of investment protection for fossil fuels
- does not foresee exclusion or roll-back of investor-state dispute settlement
- Changes to the ECT would have to be agreed unanimously by all its members. But some have already stated they see no need to revise the ECT at all.

Key civil society demands:

- exclude provisions to protect fossil fuel investments
- exclude any type of investor-state dispute settlement
- if that is not possible in the context of the modernisation, follow the example of Italy and withdraw from or jointly terminate the ECT, which has real risks but no proven public benefits
- immediately put a break on the process to expand the ECT geographically; don't allow any treaty accessions as long as the ECT is in its current state.
 - Also appeal to delegates from countries such as Benin, The Gambia, Nigeria, Panama, Senegal, Bangladesh, Chad, China, Morocco, Niger, Uganda, Serbia, Pakistan, Burundi, Eswatini, Mauritania