

## A Brief Reflection on: “One Treaty to Rule them All” Report<sup>1</sup>

A recent report published by the Corporate Europe Observatory (CEO) and the Transnational Institute (TNI) raised supposed concerns about the Energy Charter Treaty (ECT).<sup>2</sup> This Report titled “One Treaty to Rule them All” proposes reasons for leaving (or never joining) the ECT. The following analysis is a fact-based reflection in response to some of the allegations made. It will be shown that allegations against the ECT are neither valid nor substantiated.

### **Business and Energy Transition.**

CEO’s report has described the ECT as a tool for big business, which undermines the energy transition. More concretely, the report claims that foreign investors can sue governments over measures considered harmful to investor’s profits. In addition, the report argues that the ECT ‘could’ be a powerful weapon to undermine the energy transition from fossil fuels to low-carbon economies.<sup>3</sup>

In order to verify the veracity of these statements, it is necessary to analyse and understand the legal nature of the ECT. However, before doing so, it may be worth pointing out that the ability of investors to recoup lost profits (in some circumstances) through arbitration under the ECT is nothing extraordinary. It simply follows from the general standard of recovery for breaches of international law set out by the Permanent Court of International Justice, whereby compensation should “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed”.<sup>4</sup> This, or a similar standard, should be familiar to people dealing with contractual or tort (delictual) claims under many domestic legal systems.

As far as evaluating the veracity of the CEO’s allegations regarding the nature of the ECT is concerned, first, in legal terms, the ECT is a multilateral agreement, which establishes, within the energy sector, rights and obligations with respect to: investment, trade, transit and dispute settlement.<sup>5</sup>

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<sup>1</sup> Gloria M Alvarez, Laura Halonen and Nikos Lavranos have produced this report on behalf of the European Federation for Investment Law and Arbitration (EFILA). This report is a collective work that represents the position of EFILA and does not represent the particular opinion of individual members including the authors.

<sup>2</sup> Corporate Europe Observatory and the Transnational Institute, *One Treaty To Rule them All*, [https://corporateeurope.org/sites/default/files/attachments/one\\_treaty\\_to\\_rule\\_them\\_all.pdf](https://corporateeurope.org/sites/default/files/attachments/one_treaty_to_rule_them_all.pdf), visited 17 July 2018.

<sup>3</sup> Corporate Europe Observatory and the Transnational Institute, *One Treaty To Rule them All*, [https://corporateeurope.org/sites/default/files/attachments/one\\_treaty\\_to\\_rule\\_them\\_all.pdf](https://corporateeurope.org/sites/default/files/attachments/one_treaty_to_rule_them_all.pdf), visited 17 July 2018, p. 77.

<sup>4</sup> *Factory at Chorzow (Germany v Poland)*, Merits, 1928 PCIJ (Ser. A) No.17 (13 September 1928) para. 125.

<sup>5</sup> Craig S. Bamberger, 'Chapter 1. Overview', in Thomas W. Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, (Kluwer Law International 1996), p.1.



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Contracting Parties of the ECT are not businesses or private investors. The more than 50 ECT Contracting Parties are States and Regional Economic International Organisations (REIOS), including the EU and all EU Member States (with the exception of Italy, which terminated the ECT some years ago). The ECT signatories actively participated in the drafting and negotiation of the ECT as an international agreement, which has been in force since the 1990s. The ECT aims to promote investments in the energy sector and in that context offers investors international standards for the protection of energy investments, including fair and equitable treatment, compensation in case of expropriation and national and most favourable nation treatment. The ECT reflects its signatories' political objectives and intends to resolve existing problems between different types of energy economies.<sup>6</sup> In addition, the ECT resolves many of the legal clashes between different energy economies, for example between energy-rich Central Asian Republics and Western markets.

In this context, CEO's report also argues that the ECT is an inadequate legal regime for confronting climate change, as it does not discourage "climate-wrecking" oil, gas and coal investments. This is an incorrect allegation for the following reasons.

First, the ECT is technology neutral; it aims to give a level-playing field to investors investing in a host-state. Foreign investors choose to invest in energy technologies supported by fair and stable national laws. Hence, by offering stable legal frameworks, governments should encourage the type of energy technologies to which they wish to attract investments, including low-carbon investments. While, the ECT is not actively promoting renewables, and stresses cost effectiveness and historically was oriented at oil and gas, the reality nowadays is that renewable industry has utilized the ECT quite efficiently, as seen in the many cases brought by investors in renewables also mentioned in the CEO's report against countries like Spain, Italy and the Czech Republic. Indeed, it is thanks to the ECT that investors in renewable energy have been able to recoup some of the damages they have suffered due to the sudden change in the regulatory framework.<sup>7</sup>

Secondly, similarly to the ECT, modern climate change agreements such as the [Paris Agreement](#) do not explicitly encourage a particular type of energy source technology but rather support international investments in the energy sector, which includes renewable energy technologies, to help cut down carbon emissions.<sup>8</sup> Additionally, the Preamble of the ECT recognises "the necessity for the most efficient exploration, production, conversion, storage, transport, distribution and use of energy". The Preamble also refers to the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and other international environmental agreements with energy-related aspects. In fact, the ECT mentions global warming

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<sup>6</sup> For example: "The Energy Charter proposal was based on the genuine desire of the West to support democratic reform and restructuring efforts in the former communist states, and the East to forge stronger ties with the West" in Julia Doré, 'Chapter 5. Negotiating the Energy Charter Treaty', in Thomas W. Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, (Kluwer Law International 1996) pp. 137 – 155.

<sup>7</sup> Cees Verburg and Nikos Lavranos, "Recent Awards in Spanish Renewable Energy Cases and the Potential Consequences of the *Achmea* Judgment for intra-EU ECT arbitrations", *European Investment Law and Arbitration Review*, Volume 3, 2018, pp. 197–222.

<sup>8</sup> Olivia Woolley, *The Paris Climate Change Agreement: a new stimulus for international effort to promote renewable energy development?* *Environmental Law and Management*, 28(5), 185-200.



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and acidification as forms of environmental damage arising from the generation of energy from fossil fuels.<sup>9</sup> In order to address some of these concerns, the ECT includes a protocol on energy efficiency, which requires Parties to make their best efforts to encourage energy efficiency.

The ECT is not a panacea for solving climate change, but it has the potential to be an effective tool in the toolbox of a government with the political will to attract investment in green energy. Energy is a capital-intensive sector. It is for governments to decide how and what type of investment they wish to encourage and with what means. For investors there is a trade-off between risk and cost: riskier investment always requires higher potential returns. One way for governments to encourage foreign investment in the energy sector at a cheaper price is to lower the risks involved by, for example, adhering to the ECT.

### **The ECT does not undermine domestic legal systems or create a parallel system of justice for corporations.**

The CEO's report also argues that under the ECT, investors are bypassing domestic legal systems by creating a parallel system of justice, which forces governments to pay out taxpayer's money to corporations.

In this respect, foreign direct investments are positively correlated with the quality of domestic legal institutions. In a previous EFILA Report, it was discussed that inefficiency in domestic courts can contribute to a decrease in foreign investment, slow growth and difficult business environment.<sup>10</sup> Moreover, the right to initiate arbitration against the host state for a violation of investment treaty obligations -including the ones in the ECT- is one of the most fundamental characteristics of neutrality, efficiency and independence, which boost the promotion and protection of foreign investments.<sup>11</sup> Granting foreign investors access to international arbitration constitutes an effective protection tool. IIAs provide for national treatment of foreign investors in order to safeguard equal treatment between national investors and foreign investors and to secure that states will conform to internationally set minimum standards of treatment. Moreover, since foreign investors are often less familiar with local laws and court practices and domestic courts may favour local parties – or be perceived by foreigners to do so – investment arbitration appears an attractive alternative. As a

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<sup>9</sup> Clare Shine, 'Chapter 23. Environmental Protection Under the Energy Charter Treaty', in Thomas W. Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade*, (Kluwer Law International 1996) pp. 520 – 545.

<sup>10</sup> Gloria Maria Alvarez, Blazej Blasikiewicz, et al., 'A Response to the Criticism against ISDS by EFILA', *Journal of International Arbitration*, (Kluwer Law International 2016, Volume 33 Issue 1) pp. 1 – 36, A. Benassy-Quere, M. Coupet & T. Mayer, *Institutional Determinants of Foreign Direct Investment*, 30 *The World Economy* 764–782 (2007) and G. Esposito, S. Lanau & S. Pompe, *Judicial System Reform in Italy – A Key to Growth*, IMF Working Paper, 2014, available at <[www.imf.org/external/pubs/ft/wp/2014/wp1432.pdf](http://www.imf.org/external/pubs/ft/wp/2014/wp1432.pdf)> (accessed 20 July 2018).

<sup>11</sup> Stephan W. Schill, 'Part I Chapter 2: Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement', in Michael Waibel, Asha Kaushal, et al. (eds), *The Backlash against Investment Arbitration*, (Kluwer Law International 2010) pp. 29 – 50 and Alan O. Sykes, *Public versus Private Enforcement of International Economic Law. Standing and Remedy*, 34 *J. Legal Stud.* 631 (2005).



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matter of fact, the EU Justice monitor has previously confirmed that there are significant divergences between the different judicial systems across EU Member States.<sup>12</sup>

In addition, the opportunity to resort to international arbitration under the ECT plays a complementary role in the effective execution of the rule of law, in particular in some jurisdictions.<sup>13</sup> Of course these states are not always developing states – many of the recent arbitrations brought under the ECT have been against developed states such as Spain, Italy or Germany. The ICSID Convention foresees the exhaustion of domestic remedies as a possible condition of consent to arbitration. However, relatively few states have included such a requirement in their investment treaties. This may be because removing the requirement of exhaustion of domestic remedies and allowing immediate access to international procedures guarantees faster and more efficient proceedings. Although the average arbitration nowadays takes three years, this is still considerably faster than the time it takes to exhaust available remedies in many developed national judicial systems.<sup>14</sup> In addition, it may be difficult in some countries to ensure that the rule of law is applied by domestic courts or their executive branches in an impartial and independent way which results in a final decision consistent with fundamental principles of public law. One example where this was an issue was the *Yukos* case, which revealed that it was in practice impossible for the Yukos shareholders to resort to domestic courts due to their lack of independence.<sup>15</sup> As the European Court of Human Rights had indicated in its findings regarding the trial of Yukos' main shareholder Mikhail Khodorkovskiy, parts of those proceedings were "flawed in many respects".<sup>16</sup> They also found breaches of the right to a fair trial in the Russian Courts' treatment of Yukos itself.<sup>17</sup> The Russian Constitutional Court has refused enforcement of the European Court's ruling,<sup>18</sup> highlighting further the need for other fora to ensure the implementation of the rule of law. By contrast, in some other cases domestic proceedings may be enough, making resorting to international proceedings unnecessary.<sup>19</sup>

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<sup>12</sup> See supra note 10 (Alvarez, Bennassy and Esposito respectively) and European Commission Press Release, 2015 EU Justice Scoreboard: Supporting Member States to improve their justice systems' effectiveness, [http://europa.eu/rapid/press-release\\_IP-15-4575\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4575_en.htm), visited 18 July 2018.

<sup>13</sup> See supra note 10 (Alvarez)

<sup>14</sup> See supra note 10 (Alvarez),

<sup>15</sup> *Yukos Universal Ltd v .RussianFederation,UNCITRAL,PCACaseNo.AA227*, available at [www.pca-cpa.org/showpage8d50.html?pag\\_id=1599](http://www.pca-cpa.org/showpage8d50.html?pag_id=1599) , visited 18 July 2018.

<sup>16</sup> *Khodorkovskiy v. Russia*, Application no. 5829/04, Judgment (First Section), 31 May 2011, para. 202.

<sup>17</sup> *OAO Neftyanaya Kompaniya Yukos v Russia*, Application no. 14902/04, Judgment (First Section), 20 September 2011, para. 551.

<sup>18</sup> Russian Constitutional Court, Judgment of 19 January 2017, available at <http://doc.ksrf.ru/decision/KSRFDecision258613.pdf> , visited 23 September 2018.

<sup>19</sup> Following the Federal Constitutional Court's ruling that they were entitled to compensation for the government's nuclear phase out, the German parliament passed a bill enabling the Cabinet to pay compensation to power utilities RWE and Vattenfall: see Federal Ministry of Environment Press Release No. 105/18, "Bundesregierung führt beschleunigten Atomausstieg konsequent fort", 23 May 2018, available at <https://www.bmu.de/pressemitteilung/bundesregierung-fuehrt-beschleunigten-atomausstieg-konsequent-fort/>, visited 18 July 2018.