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Agenda item 5: Climate Change and Energy – the Energy Charter Treaty

28th Working Group of the Parties to the Aarhus Convention

3 July 2024



Outline

1. ***Origin of the ECT and incompatibility to tackle the climate crisis***
2. ***Investor-State Disputes and regulatory chill***
3. ***NGO campaign for withdrawal***
4. ***Way forward: coherence and overhaul of ISDS***





1. Origine & incompatibility today

Context: a multilateral investment treaty from the early 90's.

At the same time, UNFCCC in 1992 – followed by the Kyoto Protocol, Paris Agreement, national climate laws, and numerous climate litigation cases.

- **On substance**, the purpose of the ECT is no longer compatible with tackling the climate crisis
- **In practice**, no public engagement or sustainability impact assessment in the drafting of the treaty at the time. Even with the modernization negotiations that have taken place recently, very little has been achieved to reform the ECT with mostly only changes to definitions and no engagement of affected communities in the process.



2. ISDS and regulatory chill

- **Investor-State Dispute Settlement:** the driving force of the ECT, and of investment treaties generally.
 - Problems with ISDS – not transparent; risk of impartiality and conflict of interest; disproportionate awards; information about the case can be kept secret, including the mere existence of a case!
- => ISDS undermines national courts, including constitutional courts, where investors can bypass laws and procedures which otherwise apply to everyone else.**



2.bis. ISDS and regulatory chill

- **344.6 billion euros** worth of fossil infrastructure is protected under the ECT in EU, UK, Switzerland alone.
- Roughly **150 known ISDS cases** brought under the ECT
- Examples of cases:
 1. Vattenfall's challenge to Germany over its exit from nuclear power (over US\$5.1 billion of tax payer's money)
 2. Vermilion's threat to sue France led to a reversal of a decision to ban oil exploration
 3. RWE and Uniper against NL – eventually dropped



3. NGO campaign

- **5 years of campaigning** – Exit ECT
- There is a pending case before the ECHR brought by 5 young activists against European states
- *Achmea* judgment: acknowledgement of jurisdictional problem within EU

The result

- EU Member States joint withdrawal approved by the EP on 24th April and Council on 30 May. UK also announced it will withdraw.





4. The way forward

- 1. Climate coherence: continue to call for withdrawal, not a modernized ECT**
- 2. Stop the promotion and expansion of the ECT**
- 3. Conduct proper impact assessments of all investment treaties with proper stakeholder engagement**
- 4. Use domestic courts and eliminate ISDS from existing and new investment treaties**



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