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The 7th of March 2023,

Dear Ms. Metsola,

This is a response to the [letter](#) sent to you by the Secretary General of the Energy Charter Treaty, Mr. Lenz, on the 13th of February 2023 (SG/23/E/0047). To support the European Parliament, our response clarifies inconsistencies and inaccuracies within the letter.

- **The Intergovernmental Panel on Climate Change (IPCC) does refer to the dangers of the Energy Charter Treaty:** The IPCC report mentions the ECT as an example of an investment treaty which “include[s] provisions for using a system of investor–State dispute settlement (ISDS) designed to protect the interests of investors in energy projects from national policies that could lead their assets to be stranded.”<sup>1</sup> The report also recognizes that “international investment agreements may lead to ‘regulatory chill’, which may lead to countries refraining from or delaying the adoption of mitigation policies, such as phasing out fossil fuels” and that “[n]umerous scholars have pointed to ISDS being able to be used by fossil-fuel companies to block national legislation aimed at phasing out the use of their assets.”<sup>2</sup> Moreover, the report singles out the ECT: “transactions in the energy sector show a high level of investor protection also against much needed climate action which is also well illustrated by the share of claims settled in favor of foreign investors under the Energy Charter Treaty and investor-state dispute settlement.”<sup>3</sup>

While the report referred to the ECT ‘modernization’ as an opportunity for climate-oriented reform, it did not say whether the “modernized” text at the time of writing achieved climate-oriented reform. The report was published in April 2022, well before the agreement in principle on the reform of the ECT was made public. Besides the IPCC, a number of UN Special Rapporteurs, such as the Special Rapporteur on the promotion and protection of human rights in the context of climate change, addressed the dangers of the ECT and ISDS.<sup>4</sup>

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<sup>1</sup> IPCC, *Climate Change 2022 Mitigation of Climate Change: Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (April 2022) p.1506.

<sup>2</sup> *Ibid.*, p.1499.

<sup>3</sup> *Ibid.*, p.1594.

<sup>4</sup> See, e.g. Report of the Special Rapporteur on the promotion and protection of human rights in the context of climate change: *Promotion and protection of human rights in the context of climate change mitigation, loss and damage and participation* (A/77/226) (26 July 2022), paras. 15, 90.

- **The ‘modernized’ ECT is not compatible with EU climate objectives:** An assessment of the compatibility of the reform proposal with EU climate objectives must adopt a holistic view of the likely consequences of the reform.
  - **The ‘flexibility mechanism’ is not really flexible and is not aligned with climate goals and obligations:** The ‘modernized’ ECT, intended to ‘green’ the treaty, led the EU to negotiate amendments including the introduction of what has been termed a ‘flexibility mechanism’.<sup>5</sup> In practice, this mechanism is nothing more than the already existing possibility for Contracting Parties to exclude investment protection for fossil fuels in their territories and to reciprocally deny benefits to other contracting parties. The EU and the UK have thus opted to carve-out certain fossil fuel investments from investment protection under the ECT and to end protection for existing investments after 10 years from the entry into force of the relevant provisions and for new investments made after 15 August 2023 with certain exceptions. The envisaged exclusions will not, as a matter of principle, affect investment protection in the territory of other Contracting Parties unless they opt to apply them vis-à-vis investors from the aforementioned Contracting Parties reciprocally. It also includes significant loopholes and does not eliminate many protections for fossil fuels.<sup>6</sup> The agreement in principle on the ‘modernized’ ECT also serves as a backdoor extension of protection for fossil fuels through the inclusion of carbon capture, utilization, and storage (CCUS), hydrogen, ammonia, synfuels, and methanol in the treaty.<sup>7</sup> As addressed by the French *Haut Conseil pour le Climat*, “the ECT, even in a modernized form, is not compatible with the pace of decarbonisation of the energy sector and the intensity of emissions reduction efforts needed by 2030.”<sup>8</sup> This new ECT will grant existing fossil fuel investments in the EU and the UK an additional 10 years of investment protection and even maintain, for now, indefinite protection in other Contracting Parties. It is therefore not aligned with the rapid phaseout of fossil fuels that science shows is required to avoid climate catastrophe, or consistent with the IEA widely recognised scenario to limit global warming to 1.5°C above pre-industrial levels.<sup>9</sup> Even in its ‘modernized’ version, the ECT cannot be considered compatible with the EU’s binding target of domestically reducing net greenhouse gas emissions by at least 55% compared to 1990 levels by 2030.<sup>10</sup>
  - **Fossil fuels are still protected outside the UK and the EU, indefinitely:** In all other contracting parties besides the EU and the United Kingdom, existing and future fossil fuel investments, including those made by investors from the EU and the UK, would continue to be protected indefinitely. Thus, the ECT cannot be considered coherent with the commitment under the EU Green Deal to engage in the transformational change necessary to contribute to the global fight against climate change. Quite to the contrary, it

<sup>5</sup> Simon Maynard, *Three things you need to know about the modernisation of the ECT*, (Thomson Reuters, Practical Law Arbitration Blog, 3 August 2022), <http://arbitrationblog.practicallaw.com/three-things-you-need-to-know-about-the-modernisation-of-the-ect/>.

<sup>6</sup> See further on the above, Nikki Reisch, Steven Feit, Helionor de Anzizu, *A Backdoor for Fossil Fuel Protection: How Extending ECT Coverage to CCUS, Hydrogen, and Ammonia Will Lock-In Oil & Gas*, (CIEL, October 2022), [https://www.ciel.org/wp-content/uploads/2022/10/CIEL\\_Briefing\\_A-Backdoor-for-Fossil-Fuel-Protection\\_-\\_How-Extending-ECT-Coverage-to-CCUS-Hydrogen-and-Ammonia-will-Lock-In-Oil-Gas-Oct-2022-3.pdf](https://www.ciel.org/wp-content/uploads/2022/10/CIEL_Briefing_A-Backdoor-for-Fossil-Fuel-Protection_-_How-Extending-ECT-Coverage-to-CCUS-Hydrogen-and-Ammonia-will-Lock-In-Oil-Gas-Oct-2022-3.pdf).

<sup>7</sup> See further on the above, Nikki Reisch, Steven Feit, Helionor de Anzizu, *A Backdoor for Fossil Fuel Protection: How Extending ECT Coverage to CCUS, Hydrogen, and Ammonia Will Lock-In Oil & Gas*, (CIEL, October 2022), [https://www.ciel.org/wp-content/uploads/2022/10/CIEL\\_Briefing\\_A-Backdoor-for-Fossil-Fuel-Protection\\_-\\_How-Extending-ECT-Coverage-to-CCUS-Hydrogen-and-Ammonia-will-Lock-In-Oil-Gas-Oct-2022-3.pdf](https://www.ciel.org/wp-content/uploads/2022/10/CIEL_Briefing_A-Backdoor-for-Fossil-Fuel-Protection_-_How-Extending-ECT-Coverage-to-CCUS-Hydrogen-and-Ammonia-will-Lock-In-Oil-Gas-Oct-2022-3.pdf).

<sup>8</sup> Haut Conseil pour le Climat, *Report on the Modernisation of the Energy Charter Treaty, a Report of the French High Council on Climate*, (October 2022), [https://www.hautconseilclimat.fr/wp-content/uploads/2022/10/2022-10-19-TCE\\_HCC\\_EN.pdf](https://www.hautconseilclimat.fr/wp-content/uploads/2022/10/2022-10-19-TCE_HCC_EN.pdf), p. 4.

<sup>9</sup> See CIEL, IISD, ClientEarth, *Submission to the Organisation for Economic Co-operation and Development on Investment Agreements and Climate*, (March 2022) Change, <https://www.ciel.org/wp-content/uploads/2022/04/investment-consultation-v3.pdf>.

<sup>10</sup> Regulation 2021/1119/EC of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999, Article 4.1.

compromises the EU's ambition to position itself as a global climate leader "by action and by example."<sup>11</sup>

- **The timeline of the 'flexibility mechanism' is very close to the timeline of a running sunset clause – which can be neutralized through an inter-se agreement (see below):** The time at which the 10-year period of additional protection for existing investments would begin would depend on provisional application. But provisional application is optional, piecemeal, uncertain, and may likely be revoked at any time. In practice, the timing of the phase-out of the additional protections would nearly coincide with the end of the operation of the 20-year sunset clause.<sup>12</sup>
- **The carbon threshold is at odds with the EU taxonomy:** Lastly, the carbon threshold used to define protected future investments in fossil gas in the EU carve-out is higher than the threshold used by the EU internally in the taxonomy.<sup>13</sup> Therefore, the protection of future investments in fossil gas is not aligned with the EU climate objectives.
- **References to the Paris Agreement do not resolve the contradiction between investment protection and climate action:** Following the example of some recent international investment agreements (IIAs), the 'modernized' ECT has introduced references to the Paris Agreement.<sup>14</sup> But the heightened tension between investment law and the climate crisis cannot be reconciled simply by incorporating a reference to the Paris Agreement in investment agreements or arbitral proceedings. The Paris Agreement and indeed the United Nations Framework Convention on Climate Change (UNFCCC), under which it was negotiated, do not exhaustively define States' obligations regarding climate change. Multilateral Environmental Agreements (MEAs) may set the floor for climate action, rooted in science, but human rights law may well require more of States in terms of mitigation, adaptation, and loss and damage. Indeed, human rights law informs the adequacy of State climate mitigation measures to avert foreseeable climate-induced harm to human rights, including through the regulation of investment.
- **The ECT does not support Foreign Direct Investment (FDI) in renewable energy and is also problematic in the context of renewable energy cases:** Longstanding research demonstrates that the expected benefits of IIAs and ISDS have not materialized, while the costs have been unexpectedly high.<sup>15</sup> In particular, there is a lack of evidence that treaty protections benefiting investors and investments cause an increase of investment flows.<sup>16</sup> In the case of renewable energy investments, researchers have found no evidence that the ECT has had a positive influence on FDI inflows in the renewable energy sector.<sup>17</sup> Researchers have also found that ISDS can have a chilling effect on renewable energy policies and thus constrain States' regulatory

<sup>11</sup> Communication from the European Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions 'Fit for 55': delivering the EU's 2030 Climate Target on the way to climate neutrality (COM/2021/550 final).

<sup>12</sup> See IISD Report, Uncertain Climate Impact and Several Open Questions, An analysis of the proposed reform of the Energy Charter Treaty, October 2022, p. 16, <https://www.iisd.org/system/files/2022-07/energy-charter-treaty-agreement-analysis.pdf>.

<sup>13</sup> *Ibid.*, p. 15.

<sup>14</sup> Energy Charter Secretariat, *Agreement in principle on the modernisation of the Energy Charter Treaty* (24 June 2022), [https://www.bilaterals.org/IMG/pdf/reformed\\_ect\\_text.pdf](https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf), Article 19.

<sup>15</sup> E.g. in the 2018 OECD Working Paper on Societal Benefits and costs of International Investment Agreements, Joachim Pohl states that: "that there is no empirical confirmation that BITs increase FDI flows or stocks," p.30; see also IISD, Client Earth, and CIEL, *Submission to the Organization for Economic Co-operation and Development on Investment Agreements and Climate Change*, (22 March 2022), <https://www.iisd.org/system/files/2022-03/investment-consultation-V3.pdf>.

<sup>16</sup> Josef C. Brada, Zdenek Drabek, and Ichiro Iwasaki, *Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis*, 35(1) *Journal of Economic Surveys* (2021) 34, p. 58: investment treaties "have an effect on [FDI] that is so small as to be considered as negligible or zero."; Christian Bellak, *Economic Impact of Investment Agreements*, Department of Economics Working Paper Series No. 200, (2015), p. 19: "the empirical evidence on the basis of a meta-analysis suggests that the FDI promotion effect of [bilateral investment treaties] seems to be economically negligible."

<sup>17</sup> Kyla Tienhaara and Christian Downie, *Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes*, 24(3) *Global Governance: A Review of Multilateralism and International Organizations* (2018).

flexibility.<sup>18</sup> It is therefore difficult for States to justify the conclusion of IIAs with ISDS and the continuation of existing ones, such as the ECT.<sup>19</sup>

- **EU Member States withdrawing from the ECT can neutralize the sunset clause by concluding an inter se agreement:** Article 41 of the Vienna Convention on the Law of Treaties applies where the treaty does not prohibit such modifications, as is the case with the ECT. The Vienna Convention on the Law of Treaties is largely considered to be an “authoritative codification of international law”<sup>20</sup>; States *do not need* to be parties to this Convention to be bound by its rules.<sup>21</sup>
- **The fact that the EU has other investment agreements that protect fossil fuels is not an argument for the EU to shy away from withdrawing from the problematic ECT:** Rather, it highlights that the ECT is not the only investment treaty that works against EU climate goals.<sup>22</sup> Acknowledging that other EU and Member State investment treaties besides the ECT are also misaligned with global, EU, and national climate goals should encourage the EU and its Member States not only to withdraw from the ECT, but also to consider terminating other investment treaties.

“A coordinated exit from the ECT and an agreement excluding the application of the sunset clause between willing contracting parties,”<sup>23</sup> which the European Parliament has already called on the European Commission and EU Member States to undertake, remains the best alternative and the way forward regarding the ECT.<sup>24</sup> This is the safest and most coherent, comprehensive, and certain approach to ensuring the complete withdrawal from the ECT, allowing EU Member States to regain their regulatory power and to pursue their environmental objectives and obligations.

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<sup>18</sup> Mithatcan Aydos et. al, *Scaling Investment in Renewable Energy Generation to Achieve Sustainable Development Goals 7 (Affordable and Clean Energy) and 13 (Climate Action) and the Paris Agreement: Roadblocks and Drivers*. New York: Columbia Center on Sustainable Investment (CCSI), December 2022.

<https://ccsi.columbia.edu/content/renewable-energy-investment-roadblocks-drivers>; Ladan Mehranvar and Sunayana Sasmal. *The Role of Investment Treaties and Investor-State Dispute Settlement in Renewable Energy Investments*. New York: Columbia Center on Sustainable Investment (CCSI), December 2022.

<https://ccsi.columbia.edu/content/renewable-energy-investment-roadblocks-drivers>.

<sup>19</sup> Lise Johnson, Lisa Sachs, Brooke Güven, and Jesse Coleman, *Costs and benefits of investment treaties, Practical considerations for States*, (Columbia Center on Sustainable Investment 2018), p. 15.

<https://ccsi.columbia.edu/sites/default/files/content/pics/Cost-and-Benefits-of-Investment-Treaties-Practical-Considerations-for-States-ENG-mr.pdf>.

<sup>20</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Dissenting Opinion of Vice-President Schwebel to the Judgement of 15 February 1995, p. 26.

<sup>21</sup> Provided in article 41 of the Vienna Convention on the Law of Treaties. The VCLT is the key document reflecting the customary international law and progressive development of international treaty law. Although it is ratified by 116 States, it is considered universally applicable, and was done so in the past by various international judicial bodies, such as the International Court of Justice, the European Court of Human Rights, and international arbitral tribunals (See e.g. *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* Judgement of 25 September 1997).

<sup>22</sup> Columbia Center on Sustainable Investment, *Climate Action Needs Investment Governance, Not Investment Protection and Arbitration, Response by the Columbia Center on Sustainable Investment to the OECD Public Consultation on Investment Treaties and Climate Change*, (March 25, 2022)

<https://ccsi.columbia.edu/sites/default/files/content/docs/publications/ccsi-oecd-climate-action-investment-governance-not-protection-isds.pdf>.

<sup>23</sup> European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty (2022/2934(RSP)), para. 18.

<sup>24</sup> See CAN Europe, SOMO, Friends of the Earth Europe, ClientEarth, Veblen Institute, CIEL, *Assessing Options Forward with the Energy Charter Treaty*, 20 February 2023, [https://caneurope.org/content/uploads/2023/02/ECT-briefing\\_ways-forward\\_CAN-Europe\\_Feb-2023-1.pdf](https://caneurope.org/content/uploads/2023/02/ECT-briefing_ways-forward_CAN-Europe_Feb-2023-1.pdf).

**In summary**, the minor changes proposed in the ‘modernized’ ECT—such as the mentioning of the Paris Agreement and the adoption of a ‘flexibility mechanism’—do not result in the compatibility of the entire ‘modernized’ treaty with other environmental obligations the EU has set out to achieve or undertake. The option of first modernizing the ECT before withdrawing from it would have devastating legal and political consequences: the ‘modernization’ process could take years to complete, and, as explained above, the ‘modernized’ ECT would not address the inconsistencies with the EU’s and its Member States’ environmental obligations. It is, therefore, imperative to continue to consider immediate withdrawal from the treaty.

We remain available for further exchange on this important issue.

Respectfully,

Nikki Reisch, Climate and Energy Program Director, Center for International Environmental Law

Maria Kleis-Walravens, Head of Energy Systems, Europe, ClientEarth

Copy:

- Ms. Kadri Simson, European Commissioner for Energy
- Mr. Valdis Dombrovskis, European Commissioner for Trade
- Mr. Frans Timmermans, Executive Vice President of the European Commission