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Investment Governance in Africa to Support Climate Resilience and Decarbonization

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Africa, Climate Change, and Investment Governance Frameworks

African nations have only marginally contributed to global warming relative to developed and emerging economies in the Americas, Asia, and Europe. However, the African continent will bear a disproportionate burden of the negative impacts of climate change.[1] Climate-related challenges like flooding, drought, and intense heat waves will increasingly confront the continent at a worsening rate.[2] African nations should not be expected to take the lead in addressing a climate emergency they did not create.[3] The priority for Africa is to receive support and investment to build resilience and adapt to climate impacts.

Alongside preparing for irreversible climate change, Africa should also invest in the zero-carbon future. Africa has rich endowments of renewable energy and natural resources, such as minerals that are critical for the energy and digitalization transformations.[4] Moreover, investment in zero-carbon electricity, transport, buildings, and industry is needed for Africa to develop sustainably.[5] Rather than following the climate-destructive development pathway of developed and emerging economies, Africa can and should leapfrog to low-emissions sustainable development.

1 Isabelle Niang, Oliver C. Ruppel, Mohamed A. Abdrabo, Ama Essel, Christopher Lennard, Jonathan Padgham, Penny Urquhart, *Africa*. In: *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge and New York: Cambridge University Press, 2014), https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-Chap22_FINAL.pdf.

2 "Climate Change Is an Increasing Threat to Africa," *UN Climate Change News*, October 27, 2020, https://unfccc.int/news/climate-change-is-an-increasing-threat-to-africa.

3 "Common but Differentiated Responsibilities," United Nations Environment Programme Law and Environment Assistance Platform, https://leap.unep.org/knowledge/glossary/common-differentiated-responsibilities.

4 Perrine Toledano, Martin Dietrich Brauch, Solina Kennedy, and Howard Mann, *Don't Throw Caution to the Wind: In the Green Energy Transition, Not All Critical Minerals Will Be Goldmines* (New York: CCSI, May 2020), https://ccsi.columbia.edu/content/dont-throw-caution-wind-green-energy-transition-not-all-critical-minerals-will-be-goldmines.

5 Perrine Toledano, Martin Dietrich Brauch, Karan Bhuwalka, and Kojo Busia, *The Case for a Climate-Smart Update of the Africa Mining Vision Reference* (New York: CCSI, April 2021), https://ccsi.columbia.edu/content/case-climate-smart-update-africa-mining-vision.

In doing so, Africa can avoid locking itself into the declining fossil fuel–based economy while taking advantage of the opportunities presented by decarbonization.[6]

However, existing investment governance frameworks hinder, rather than catalyze, the transition to climate-friendly investment opportunities.[7] International investment agreements (IIAs) and investor–state dispute settlement (ISDS) in particular work against climate goals. This blog post explores the effects of IIAs on climate action by looking in particular at the Energy Charter Treaty (ECT),[8] extrapolates these lessons to other IIAs, and concludes with some ideas for climate-aligned investment governance.

What is the Energy Charter Treaty?

The ECT[9]—a multilateral agreement ratified or acceded to by 50 countries, the European Union, and Euratom[10]—was signed in 1994 and has been in force since 1998. Western European countries spearheaded the ECT as an energy sector cooperation framework, particularly with post-Soviet states in Eastern Europe and Central Asia. The ECT allows foreign investors in the energy sector to sue their host states in international arbitration, claiming monetary compensation when government policies and measures affect their interests. With 142 known arbitration cases initiated as of August 2021,[11] the ECT is the most frequently invoked treaty for ISDS claims.[12]

In 2012, ECT members launched a policy for consolidation, expansion, and outreach (CONEXO),[13] campaigning for developing countries, including in Africa, to accede to, or become members of, the ECT. As a result, several countries and regional organizations in Africa have taken steps towards ECT accession. Many have signed the International Energy Charter,[14] which is regarded as the first step. Several others have gone beyond and are either working on accession reports or approving them internally.[15] Uganda is far down the process, just waiting for an

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6 Jeffrey D. Sachs, Perrine Toledano, Martin Dietrich Brauch, Tehtena Mebratu-Tsegaye, and Efosa Uwaifo, "Roadmap to Zero-Carbon Electrification of Africa" (Working Paper, New York: CCSI, September 2021), https://ccsi.columbia.edu/content/roadmap-zero-carbon-electrification-africa.

7 Martin Dietrich Brauch, "Reforming International Investment Law for Climate Change Goals." In *Research Handbook on Climate Finance and Investment Law,* edited by Michael Mehling and Harro van Asselt (Cheltenham: Edward Elgar Publishing Ltd, forthcoming), https://academiccommons.columbia.edu/doi/10.7916/d8-300v-7h63.

8 Martin Dietrich Brauch, "Should the European Union Fix, Leave or Kill the Energy Charter Treaty*?" Columbia Center on Sustainable Investment* (blog), February 9, 2021, https://ccsi.columbia.edu/news/should-european-union-fix-leave-or-kill-energy-charter-treaty.

9 Energy Charter Secretariat, *The International Energy Charter Consolidated Energy Charter Treaty with Related Documents* (Brussels: Energy Charter Secretariat, January 15, 2016), https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf.

10 "Members and Observers to the Energy Charter Conference," International Energy Charter, last updated October 17, 2018, https://www.energycharter.org/who-we-are/members-observers.

11 "List of Cases," International Energy Charter, https://www.energychartertreaty.org/cases/list-of-cases.

12 "Investment Dispute Settlement Navigator," UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search.

13 "Consolidation, Expansion and Outreach," International Energy Charter, last updated November 30, 2015, https://www.energycharter.org/what-we-do/conexo/overview.

14 "The International Energy Charter," International Energy Charter, last updated June 23, 2016, https://www.energycharter.org/process/international-energy-charter-2015/overview.

15 "Members and Observers of the Energy Charter Conference," International Energy Charter, August 1, 2021, https://www.energycharter.org/fileadmin/ImagesMedia/KC/Energy_Charter_Map_2021-August.jpg.

invitation from ECT Members to join. Burundi, Eswatini, and Mauritania are in the process of ratifying the ECT, after which they will be subject to the application of the treaty and ECT-based arbitration.

The Recent History of ECT Modernization

In late 2017, ECT members launched a renegotiation process, targeting finalization in 2019. The process started off with a long list of topics for renegotiation.[16] Some investment protections would be revised, and some language would be negotiated on sustainable development and corporate social responsibility. But many key topics were absent from that list, such as bringing the treaty in line with the climate goals under the Paris Agreement and the zero-carbon energy transition, providing for a just transition, or meaningfully reforming (or, ideally, getting rid of) investment arbitration.

After seven rounds of negotiations, little progress has been made. Since any amendment requires unanimity of ECT members, bold reform is highly unlikely. Under pressure by civil society, several European Union (EU) Member States are calling for the EU to collectively withdraw from the treaty,[17] or for European Commission guidance on how to withdraw unilaterally. During this so-called "modernization" process, the ECT Conference put a pause on inviting accessions.[18] Despite this pause, the ECT secretariat still set aside funds for CONEXO to attract more members.

ECT: Unproven Advantages, Numerous Disadvantages

One of the foremost promises is that ECT accession would help African countries attract much-needed energy investment from the capital-exporting countries that are party to the treaty. According to the African Development Bank,[19] more than 640 million Africans do not have access to electricity; Africa's electricity access rate of roughly 40% is the lowest in the world. In sub-Saharan Africa (excluding South Africa), per capita consumption of electricity amounts to only 180 kWh.

However, the economic literature—surveyed here[20] and there[21]—does not support the claim that the ECT or other IIAs realize this objective. The evidence does not support that IIAs increase the quantity or quality of foreign

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16 Energy Charter Secretariat, Decision of the Energy Charter Conference: Subject: Adoption by correspondence – Report by the Secretary-General on the Activities in 2020, March 9, 2021, https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2021/CCDEC202104.pdf.

17 Fabian Flues, Pia Eberhardt, Cecilia Olivet, PowerShift, and Corporate Europe Observatory (CEO), *Busting the Myths Around the Energy Charter Treaty: A Guide for Concerned Citizens, Activists, Journalists and Policymakers* (Berlin, Brussels, and Amsterdam: TNI, December 2020), https://www.tni.org/en/ect-mythbuster.

18 Energy Charter Secretariat, Decision of the Energy Charter Conference.

19 "Light Up and Power Africa – A New Deal on Energy for Africa," The High 5s, African Development Bank Group, https://www.afdb.org/en/the-high-5/light-up-and-power-africa-%E2%80%93-a-new-deal-on-energy-for-africa.

20 Lise Johnson, Lisa Sachs, Brooke Güven, and Jesse Coleman, *Costs and Benefits of Investment Treaties: Practice Considerations for States* (New York: CCSI, March 2018), https://ccsi.columbia.edu/sites/default/files/content/docs/publications/07-Columbia-IIA-investor-policy-briefing-ENG-mr.pdf.

21 Joachim Pohl, "Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence Reference" (OECD Working Papers on International Investment No. 2018/01, Paris: OECD, January 19, 2018),

investment, nor that they help depoliticize conflicts between countries, or promote good governance reform or strengthen the rule of law in the host country. Indeed, the advantages of joining the ECT are unclear.

On the other hand, the disadvantages of the ECT are clear and numerous,[22] and these include:

1. The ECT's focus is on granting foreign investors certain privileges under international law, which they can enforce against states through ISDS. The costs of potential arbitration cases can be high for states, often in the hundreds of millions of dollars. When the investor wins, the damages are paid from state coffers—from taxpayer money that African countries should instead be using for development priorities.

2. The ECT does not extend the same privileges to domestic investors, and it does not offer protections or remedies for individuals or communities affected by energy investments.

3. Like most other IIAs, the ECT does not include obligations on foreign investors to respect domestic laws on environment or climate or to help host countries build climate resilience. (Even when such clauses have been included in newer treaties, they have not protected states from liability for breach nor have they been enforceable against investors.)

4. Supporters of the ECT say it is "technology neutral" because it protects all types of energy investment. However, from a climate perspective, investments in renewable energy and in fossil fuels are not equally desirable and therefore do not merit equal protection.

5. Fossil fuel and other greenhouse gas–intensive companies can use ISDS to challenge climate regulation that goes against their interests.[23] Even if they do not launch arbitration, the mere availability or threat of arbitration can discourage governments from adopting climate policies, a phenomenon known as regulatory chill.[24] Accordingly, ISDS under the ECT is at odds with the rule of the law and undermines states' sovereign right and duty to regulate in the public interest.

6. Investors can use the threat of compensation awards of millions or even billions of dollars to put pressure on governments to allow new fossil fuel projects to move forward, at a risk of accelerating climate change and further locking in fossil fuel dependence. The Save Lamu campaign[25]—in which community resistance brought

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https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en.

22 Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, "Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition," *Transnational Dispute Management* 1, Special Issue (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446723.

23 Ella Merrill and Martin Dietrich Brauch, "U.S. Climate Leadership Must Reject ISDS: As the United States Faces Another $15 Billion Suit from the Fossil Fuel Industry, it's Time for President Biden to Take a Decisive Stance," *Columbia Center on Sustainable Investment* (blog), July 13, 2021, https://ccsi.columbia.edu/news/us-climate-leadership-must-reject-isds-united-states-faces-another-15-billion-suit-fossil-fuel.

24 Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," *Transnational Environmental Law* 7, No. 2 (2018): 229–250, https://www.cambridge.org/core/journals/transnational-environmental-law/article/regulatory-chill-in-a-warming-world-the-threat-to-climate-policy-posed-by-investorstate-dispute-settlement/C1103F92D8A9386D33679A649FEF7C84.

25 "Lamu Coal Plant," Save Lamu, https://www.savelamu.org/about/ourwork/lamu-coal-plant.

to a halt a project to build a coal-fired plant in Lamu, Kenya[26]—illustrates how countries that are not party to the ECT and similar IIAs have greater ability to stop environmentally and economically unjustifiable projects without having to compensate investors.[27]

7. The ECT does not provide for a just transition for workers in the fossil fuel industry and other greenhouse–gas intensive industries. It does not create social safety nets or support their re-skilling and transition to zero-carbon jobs. It does not provide for or facilitate other forms of committed climate finance to support developing countries to invest in climate mitigation and adaptation.

8. Even if an ECT member withdraws from the treaty, the so-called sunset or survival clause of the treaty locks in its investment protections for 20 years. During that period, existing investors from remaining ECT members can still (threaten to) use ISDS to challenge, and seek compensation from, the withdrawing country for climate policies and measures it may adopt.

What Is in It for Africa?

To recap: the ECT has only unproven advantages, but numerous disadvantages.[28] The treaty cannot be said to attract sustainable, zero-carbon energy investment. It is not in line with climate goals, and given the narrow, slow, and already delayed amendment process, it is also unlikely to be meaningfully reformed to be brought in line with those goals. Even EU Member States, the ECT's original proponents, are considering abandoning it. And even after abandoning it, a country still has to endure two decades of threatened or actual ISDS cases and compensation awards that either dissuade governments from adopting climate- and sustainable development–oriented policies and measures or unjustifiably increase the costs of their adoption.

Why, in this context, would an African country give into pressures for accession and lock itself into a climate-blind treaty such as the ECT? The ECT has little to nothing to offer for Africans, and it is in fact likely to get in the way of African efforts to structure investment governance frameworks that support climate resilience and decarbonization, for the benefit of Africans and for decades to come.

The ECT is Just One Among Many Climate-Blind IIAs

The ECT is a good illustration of how IIAs work against climate goals, which is commonplace for such agreements. Another example is the ECOWAS Energy Protocol, which was signed in 2003 and is reported[29] to be in force. The protocol was inspired by the ECT and therefore is equally misaligned with climate goals.

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26 Ed Reed, "ICBC Drops Lamu Coal Plans," *Energy Voice* (blog), November 11, 2020, https://www.energyvoice.com/renewables-energy-transition/279667/icbc-lamu-coal-pressure.

27 "Majority of New Renewables Undercut Cheapest Fossil Fuel on Cost," International Renewable Energy Agency (IRENA), June 22, 2021, https://www.irena.org/newsroom/pressreleases/2021/Jun/Majority-of-New-Renewables-Undercut-Cheapest-Fossil-Fuel-on-Cost.

28 Johnson, Sachs, Güven, and Coleman, *Costs and Benefits of Investment Treaties*.

29 Robert Wheal, Elizabeth Oger-Gross, and Bachir Carl Sayegh, "Protecting energy sector investors in West Africa", *White & Case Africa Focus* 4, (Spring 2019) https://www.whitecase.com/publications/insight/protecting-energy-sector-investors-west-africa.

The many other IIAs concluded by African countries pose similar problems: like the ECT, they are also climate-blind, have no just transition focus, impose no investor obligations, etc. Above all, they do nothing to promote desirable investments, support countries to benefit from such investments, or commit states to cooperation with respect to shared development goals. They simply saddle governments with risks of carbon lock-in and expensive compensation awards.

To address the issues within climate-blind agreements such as the ECT, the ECOWAS Energy Protocol, and other IIAs, countries can explore several avenues. Options include amendment, termination, or withdrawal,[30] whether unilateral or by consent. While this blog will not explore these options in detail, more can be found on them in a CCSI publication.[31]

Getting It Right: Climate-Aligned Investment Governance

African countries can and must do better than the existing, outdated IIAs by redesigning and providing alternative governance frameworks, whether at the regional, continental, or international level, including the African Continental Free Trade Area (AfCFTA) Investment Protocol. Here are some alternatives that African countries may pursue:

1. At the most basic level, African countries can avoid climate-blind IIAs. They can withdraw from the myriad climate-blind IIAs[32] and only consider entering into IIAs in the future if they align with their sustainable development objectives.[33] Such treaties might impose investor obligations,[34] including with a climate focus,[35] and move away from investment protection and arbitration altogether.[36]

2. African countries can establish inter-ministerial groups to assess, negotiate, and implement any future treaties through a coordinated approach involving all key sectoral teams. In the case of the ECT, the decision by a country to accede to the treaty, for example, would require an assessment through an inter-ministerial group including ministries, departments, and agencies responsible for not only energy policy but also environment, finance, and the judiciary, among other relevant areas.

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30 Brauch, "Should the European Union Fix, Leave or Kill the Energy Charter Treaty*?*"

31 Lise Johnson, Lisa Sachs, Brooke Güven, and Jesse Coleman, *Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law* (New York: CCSI, April 2018), https://ccsi.columbia.edu/content/clearing-path-withdrawal-consent-and-termination-next-steps-reforming-international.

32 Johnson, Sachs, Güven, and Coleman, *Clearing the Path*.

33 Lise Johnson, Lisa Sachs, and Nathan Lobel, *Aligning Investment Treaties with Sustainable Development* (New York: CCSI, November, 2019), https://ccsi.columbia.edu/content/aligning-investment-treaties-sustainable-development.

34 Nathalie Bernasconi-Osterwalder and Joe Zhang, *Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements* (Winnipeg: IISD, April, 2018), https://www.iisd.org/publications/integrating-investor-obligations-and-corporate-accountability-provisions-trade-and.

35 Brauch, "Reforming International Investment Law for Climate Change Goals*.*"

36 Lise Johnson, Jesse Coleman, Brooke Güven, and Lisa Sachs, "Alternatives to Investor-State Dispute Settlement" (CCSI Working Paper 2019, New York: CCSI, April, 2019), https://ccsi.columbia.edu/sites/default/files/content/docs/blog/Alternatives-to-ISDS-11-April-2019_0.pdf.

3. Any dispute settlement mechanism should safeguard domestic policy space for states to adopt climate laws and regulations without being challenged by investors and, especially, without having to compensate them for any climate-oriented policy changes.

4. Countries can foster international cooperation on climate-aligned investment. For example, cooperation can focus on investments in renewable electricity, green hydrogen, critical minerals, battery production and recycling, and climate-resilient infrastructure.

5. Countries can commit to phasing out protections and incentives for carbon-intensive investments (including fossil fuel subsidies).

6. Countries can commit to creating domestic or international just transition mechanisms to support workers as they transition from carbon-intensive to zero-carbon industries.[37]

7. Countries can commit to mainstreaming principles of climate justice within their domestic and international investment legal frameworks to support the promotion of climate goals.

This list of recommendations is not exhaustive, and there is potential for creative and innovative solutions. In this new era, African nations have an opportunity to lead the world by designing Africa-made investment governance frameworks that work for, and not against, climate adaptation and mitigation goals.

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37 International Labour Organization, *Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All* (Geneva: ILO, 2015), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_432859.pdf.

38 "Organizing for Alternatives: Redesigning Investment Governance," Events, Columbia Center on Sustainable Investment, October 14, 2021, https://ccsi.columbia.edu/events/organizing-alternatives-redesigning-investment-governance.

39 Martin Dietrich Brauch and Brenda Akankunda, "Investment Governance in Africa to Support Climate Resilience and Decarbonization," *AfronomicsLaw* (blog), December 7, 2021, https://www.afronomicslaw.org/category/analysis/investment-governance-africa-support-climate-resilience-and-decarbonization.