

THE ENERGY CHARTER TREATY (ECT) IS A DECOY:

East African Community (EAC) countries should desist from acceding to it

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INTRODUCTION

Access to energy is a crucial element in the realization of the Sustainable Development Goals (SDGs). Energy access for all is one of the key drivers of inclusive growth as it creates opportunities for women, youths, and children both in urban and rural areas. However, according to the African Development Bank, over 640 million Africans have no access to energy, corresponding to an electricity access rate for African countries of only 40 percent, the lowest in the world. Per capita consumption of energy in sub-Saharan Africa (excluding South Africa) is only 180 kWh.



The solution for this has been the need to increase investment in the sector with the understanding that this will not only increase supply and access to energy, but that it will also resolve the challenge of limited affordability.

Within the EAC, 80% of the region's energy consumption is traditional biomass. The share of kerosene used as a primary energy source in the region is relatively small compared to the use of traditional biomass, but it is still significant. This can be a struggle when there is not enough money to buy food and the decision between one or another has to be made, besides being extremely harmful to health. Also, in some cities, the people that have access to electricity find it too expensive compared to what they earn.



This is why rural electrification is not only critical but is also essential. However, many private energy investors are not interested in investing within the rural areas owing to questions about the rate of return on investment. Without state intervention, such areas may never access electricity despite the region's promising potential for the exploitation of a wide range of renewable energy resources for energy production and the provision of energy services. As these countries are seeking to attract potential investment, investment exporting countries are also working to secure opportunities within the continent using the Energy Charter Treaty (ECT).

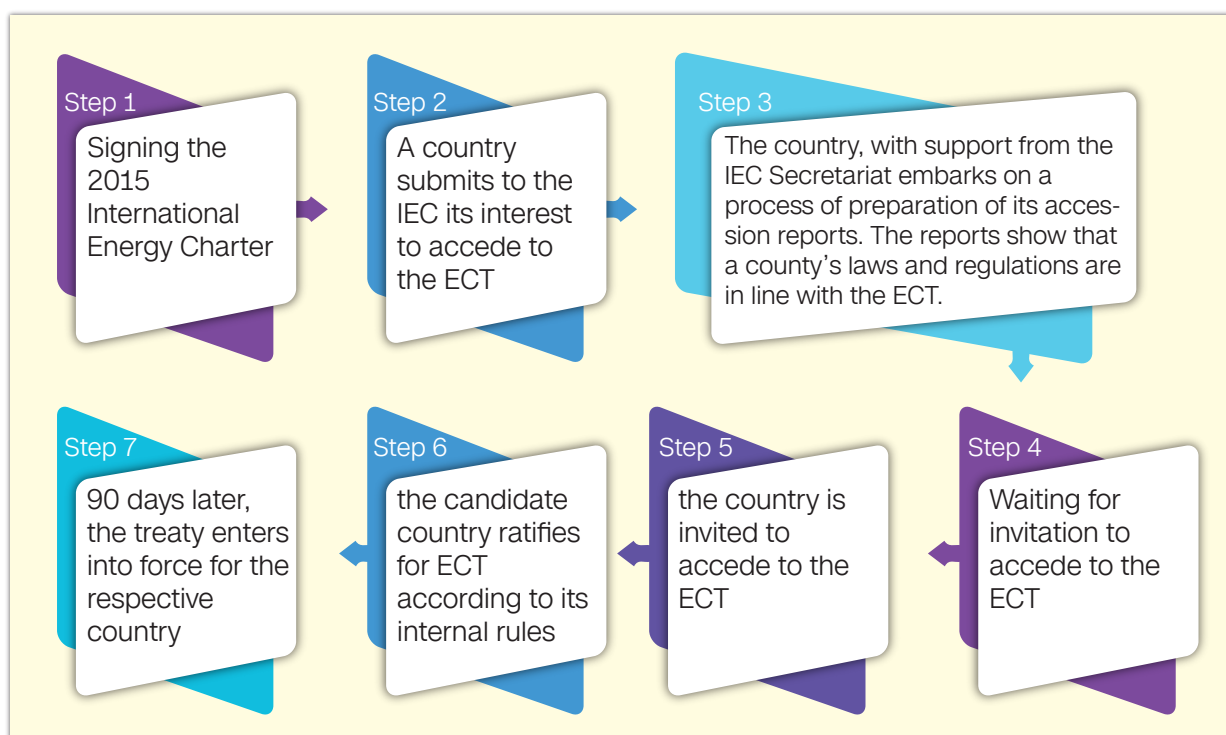
The ECT is an International Investment Agreement (IIAs) that establishes a multilateral framework for cross-border cooperation in the energy industry. The treaty covers all aspects of commercial energy activities including trade, transit investments and energy efficiency. The treaty was signed in December 1994 and entered into legal force in April 1998. Currently there are fifty-three Signatories and Contracting Parties to the Treaty. This includes both the European Union and Euratom. Its key beneficiaries are countries from Western and Eastern Europe, Central and Western Asia, and Japan, Jordan

and Yemen. Due to its wide geographical reach and its extremely broad and generous investor privileges the ECT is a particularly dangerous investment agreement.

State of play of the ECT in the EAC's context

The secretariat of the ECT has been putting effort to expand the membership of this treaty to other countries in Asia, Africa, Middle East and Latin America. Already, five of the East African Community (EAC) countries have signed the non-legally binding International Energy Charter (IEC). The Government of Burundi, Tanzania and Uganda signed the IEC in 2015, while the Government of Rwanda in 2016, and the Government of Kenya and the EAC as an intergovernmental institution signed the charter in 2017.

As a consequence, the ECT Secretariat has continued to lobby these countries to take additional steps towards acceding to the treaty. Below are the seven steps involving the accession process:



After the Government of Burundi signed the IEC, the country submitted its expression of interest to accede to the ECT, after which it embarked on the process of developing its accession reports for submission to the secretariat. On 19th December 2016, Burundi embarked on a process of preparing its accession reports, after which it was expected to embark on its national ratification process, a step it has stayed until to date. This is the step that often takes the longest because at this point, most countries start to think about the risks and costs of the treaty.

Following the signing of the non-binding IEC, the Government of Uganda through the Ministry for Energy and Mineral Development on 6th December 2019, sent an "Accession Intention Letter" to the Secretariat of the ECT informing them of the country's intent to join and ratify the treaty. However, Uganda's invite was "put on hold". Nonetheless, the Secretariat's vision is that by 2021, ECT membership would spread on all continents and would become quasi-universal. The Secretariat has continuously downplayed the risks of the ECT and overstated its benefits, and as a result, many African countries seem to be slowly falling prey, with its extreme investor privileges. In signing up, they risk shrinking their ability to decide their own energy policy, as well as opening themselves up to the potential costly lawsuits by investors. This is why, within Europe the push back to end to life of this controversial treaty has been growing. EU based Trade and Environmental groups under the "NoECT" campaign have been calling on their governments to pull out of the treaty, even amidst ongoing negotiations to "modernize" this obsolete treaty.

Using this brief, we would like to demystify, from an East African perspective, some of the risks associated with acceding to the ECT, while drawing insights from home based experiences.

RISKS ASSOCIATED WITH THE ECT

The ECT is a hazardous treaty due to its expansionist oddity and also for the fact that its listed a number of lavish promises to the states that would cooperate. However, this was before the risks of the treaty came out. There are a number of risks following the accession to the Energy Charter Treaty (ECT) and these include:

1. Shrinking the policy space of governments to regulate in the public interest

Threats arising from the outcomes of investor state arbitration due to concerns raised by the former regarding loss or potential loss of profit due to the enactment of a specific legal framework could result into "regulatory chill". Investor state arbitration in the ECT is at odds

"When I wake up at night and think about arbitration, it never ceases to amaze me that sovereign states have agreed to investment arbitration at all... Three private individuals are entrusted with the power to review, without any restriction or appeal procedure, all actions of the government, all decisions of the courts, and all laws and regulations emanating from parliament."

Juan Fernández-Armesto, arbitrator

with the rule of the law and undermines the legal system. On the contrary to justice the system creates a parallel situation where only the rich are able to take part and in this case the investor. In addition, the arbitration system is very secretive and riddled with conflict since the arbitrators are up for big wins of money and also sustaining the existence of the ECT. It is also based on a foundation of provision of protection of foreign energy investments. This gives power to the investors since they can directly sue states outside of existing courts, in international tribunals consisting of three private lawyers, the arbitrators. In these tribunals, companies can claim shocking sums in money as compensation for government actions that they argue could result into loss of profits now and in the future. The ECT more than any other trade and investment agreement has triggered numerous investor law suits. Over 120 investor lawsuits were listed on the ECT secretariat in December 2019.

2. The ECT could also undermine environmental protection

Currently, there are several controversial energy projects in ECT accession countries. In some of the countries, community resistance has even resulted into a halt of the projects. However, governments which halt dirty power plants or drilling rigs risk being held liable for millions if not

billions of damages under the ECT. The treaty could also be used to put significant pressure on governments to allow new projects even though they risk accelerating climate change and further locking in fossil fuel dependence. Taking the case of Kenya, the Save Lamu campaign against a coal-fired plant in Lamu is a good example of how countries that are not part of the ECT can free themselves from bad projects without having to compensate any investors.

A small, assumedly voiceless community helped the entire country of Kenya to push back powerful and influential forces intending to pursue profit interest at the expense of the environment¹.

Community members and activists bravely and tirelessly resisted plans to construct a 1,050-megawatt coal-fired power plant on the Lamu coastline, in Kenya, despite intimidation, repression and smear campaigns. They left no stone unturned in their efforts to hold the actors responsible for this disastrous project accountable.

On 26th June Kenya's National Environment Tribunal (NET) revoked the licence granted to Amu Power Company to build a coal power plant in Lamu, on the Kenyan coast. The planned \$2 billion coal plant in close proximity to the UNESCO World Heritage site faced various economic, environmental, health and cultural arguments against it. This case represents a win for the public participation of locals in environmental governance, for environmental law enforcement and for ensuring that businesses and governments are answerable to communities.

"It has stamped the authority of tribunals in courts to ensure compliance with the rule of law," Ochiel Dudley, a lawyer with Katiba Institute.

The tribunal ruled that the National Environment Management Authority (NEMA) failed to do a thorough environment and social impact assessment (ESIA) that met the requirements of the law. Aspects missing included detailed insights into how much pollution from coal, dust and ash the plant would produce, and how this would affect people, plants, animals and marine life.

This ruling has set a crucial standard for environmental and social impact assessments in East Africa.

The National Environment Tribunal additionally ruled that the public participation done was insufficient. Whilst there were meetings with the community, appropriate information was not shared. The Tribunal stated "Would the members have supported the projects if they knew about the effects on human health, damage of flora and fauna, immature deaths and even caused adverse effects on forests? There might be ways to mitigate the same. However, the residents ought to have been notified of these before a licence was issued". The ruling underlined that public engagement cannot be mechanical but should be meaningful.

Lamu, Kenya is a bio-cultural wonder. It hosts critical wildlife corridors, pristine beaches, and internationally-recognized forest and marine reserves. It is also home to Lamu Old Town, a UNESCO World Heritage site renowned for its traditional Swahili architecture and customs. Thousands of artisanal fisher people and tourism operators ply their trade on traditional dhow boats, while farmers, semi-nomadic pastoralists, and indigenous hunter-and-gatherer communities continue to carve out livelihoods utilizing the area's rich and diverse natural resources.

3. Acceding to the ECT will lock African countries into the failures of energy privatisations

The ECT is primarily grounded within the private sector led strategy for energy development. The treaty was established to promote energy security through the operation of more open and competitive energy markets.

In 1999, the Uganda Electricity Board (UEB) was unbundled by the government of Uganda, creating three subsidiary independent companies: Uganda Electricity Generation Company Limited (UEGCL) to provide for electricity generation services; Uganda Electricity Transmission Company Limited (UETCL), to provide for the transmission of electricity to the distributor; and Uganda Electricity

¹ Read more at: <https://www.theelephant.info/op-eds/2019/07/15/saving-lamu-how-a-campaign-for-environmental-justice-was-fought/>

Distribution Company limited (UEDCL), to distribute electricity to end consumers.

On 26 March 2001, a private company called Umeme Ltd was formed under the Public Enterprises Restructuring & Divestiture (PERD) Statute, 1993 and the Companies Act Cap 110 as one of the successor companies of Uganda Electricity Board (UEB), charged with carrying on the business of distribution and sale of electricity to all Ugandans. Umeme Ltd was established by a Consortium of Globeleq and Eskom Enterprises. It entered into a lease and assignment agreement with UEDCL, a support agreement with the government of Uganda, a power sales agreement with UETCL, and is licensed by the Electricity Regulatory Authority (ERA) for distribution, supply and embedded generation.

In 2004, Umeme Ltd entered into a 20-year concession agreement to operate the business of electricity distribution. The main consideration for the signing of this agreement was premised on an understanding that Umeme Ltd would invest US\$65 million in the distribution of electricity within the first five years of operation that would help in acquiring the relevant technology to upgrade the electricity distribution system (ERA, 2007). This was intended to guarantee broader coverage of electricity usage, reduce electricity losses, and create a modern billing system that would ensure that customers can get accurate and regular bills, with tariffs per unit of electricity consumed considerably lowered, and loadshedding (deliberate power cuts) eliminated. Despite the significant structural reforms implemented in the power sector, Uganda still faces several short- and medium-term challenges in this sector, which are affecting growth. Despite the mandate given to Umeme Ltd in the concession agreement, the company has failed to fulfil the fundamental terms and conditions therein. For example, the electricity sector continues to lose power in the grid, and the power tariffs have skyrocketed.

As soon as the country's electricity utility was privatised in 2004, Umeme started hiking prices. Tariffs immediately rose by 24% and then by a further 34% two years later. By 2014, Ugandans were paying some of the highest electricity tariffs in sub-Saharan Africa at 19 cents per kilowatt (the regional average is just 13 cents). At one point, it was reported that Ugandans were paying more for a kilowatt hour of electricity than any other country in the world bar Sweden. As at March 2020, electricity tariffs for domestic consumers were at 676 Uganda shillings per kWh (0.186 USD) while commercial consumers were at 575 Uganda shillings per kWh (0.158 USD)². This has continued to happen despite Umeme getting a 60% subsidy to top up its tariff revenues. It has also extracted a dubious "compensation" payment of £550,000 from the government for lost profits. Although some subsidies were later scrapped but that led to further rate hikes. The government can't renationalise the network, as the contract states it would be liable to pay huge amounts in compensation (a figure which stood at \$576 million in 2011). The ERA has miserably failed in this task, especially in being able to regulate Umeme, and Ugandans have been left to suffer at the hands of the company.

Uganda is not the only country that has registered bad experiences with privatization. In Ghana and other countries, corporations have increased electricity bills after taking control of public systems – often making electricity unaffordable for those who earn lower wages and hence reducing access. As such, many countries have thought of reversing this policy decision. Moreover, it is not surprising that up to 1996, privatization throughout the continent had been slow, with few visible results and a general feeling among observers and donors that African governments' commitment to the process was generally half-hearted. Reversing failed privatisation may lead to loss of millions in lawsuits brought against a state by the energy investors. This happened, for example, to Albania after it revoked the electricity distribution license of Czech energy giant ČEZ. The company filed a €190 million ECT claim in response in 2013.³ Reversing from the privately owned energy investments to public could help governments regain their policy space to

2 www.globalpetrolprices.com

3 ČEZ v. The Republic of Albania, [https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/522/-](https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/522/)

regulate the prices charged to consumers, invest in infrastructure, provide fairer conditions on the job for workers, among others.

However, the ECT can be used to impede any type of regulation on energy investments, including regulation of energy power tariffs to make energy affordable for all. Within Africa, many governments have suffered with being able to untangle themselves out of privatisation of their energy sector, a situation which should not be made even harder through their accession to the problematic ECT.

4. The ECT targets only energy Ministries

The ECT Secretariat seems to target primarily the energy ministries of its potential new member states. On the other hand, officials with experience in negotiating investment treaties and defending investor state arbitrations (i.e. those with long experience of the risks these kinds of treaties present), appear largely absent from the accession process. According to a report by TNI, CEO and SEATINI titled, the Silent Expansion of the Energy Charter Treaty, it is a common practice for countries to designate their energy ministries as the competent agencies to decide whether or not to join the Energy Charter. Since these ministries are typically not involved in the negotiation of trade and investment treaties, the legal implications of the 1994 Energy Charter Treaty may not always be adequately understood, including its political and financial risks in some accession countries.

While many, such as Tanzania, have had disastrous experiences with corporate lawsuits under other investment agreements and contracts, reports written by national experts who have temporarily been seconded to the Brussels-based ECT Secretariat, for example, are full of unproven claims about how the ECT “can positively impact” a country or region “with regard to attracting the needed energy investments” – without saying anything about the risks of the ECT’s vast investor privileges once a country has acceded to the treaty.

Without ensuring a comprehensive and well coordinate approach in the decision making

process on whether or not a country should accede to the ECT, key trade and investment national policies and laws, already aligned to the country’s National Development Plan risk being undermined. It also undermines the role of key stakeholders like civil society, academia, and other socio-economic actors, both state and non-state.

CONCLUSION

In conclusion, in these times of great economic and social uncertainty it is absurd to sign on to a treaty with such costly consequences for states. Public money that is urgently needed to address crucial health, social care and economic needs should not end up in the pockets of private lawyers and large energy companies using the ECT to seek unmerited compensation.

The Energy Charter Secretariat is in expansion mode, wanting to gain access to energy resources in Africa and Asia for its current members, and extending a far-reaching (and outdated) investment protection system to investments in resource-rich countries. However, it is clear that the ECT will not address Africa’s numerous energy problems. Therefore, African Ministry of Energy leaders should make sure that their countries, majority of which possess a rich variety of energy resources do not fall prey to the ECT’s expansion process in the Global South– and the ECT Secretariat should stop pursuing these states to accede to an agreement that majority of its members already consider seriously flawed.

RECOMMENDATIONS

1. The best-case scenario now is that countries which have only signed the political declaration i.e. signing the IEC like Kenya, Tanzania, Uganda, and Rwanda, should be cautious of the slippery slope of joining the ECT, with its high-risk investment protection framework.
2. Countries that have not yet joined the political declaration must therefore assess the risks and benefits of doing so, taking into account the danger of being pulled into the ECT accession, amidst the ongoing expansion. Countries like Burundi that have already acceded to the ECT should consider not

ratifying and instead express their interest not to ratify, as Russia did in April 2018.

3. In view of the proliferating number of investment treaties, broad and sectoral based, African governments should draw key lessons from the ECT accession process and endeavour to approach all future treaties in an inter-ministerial group. This should involve an assessment, negotiations and implementation of the treaty(ies) through a coordinated approach involving all key sectoral teams. In the case of the ECT, the decision by a country to sign the 2015 IEC and accede to the 1994 ECT would require an assessment through an inter-ministerial group including ministries, departments and agencies responsible for not only energy policy but also trade and investment policy.
4. The EAC partner states should, despite only being observers within the IEC, advance their interests in order to preserve their policy space to freely direct private energy investments to rural areas for rural electrification, charge specific tariffs to ensure affordability, and promote investment in renewable energy resources.
5. In addition, this should be done as a bloc as this would strengthen their position. Since the EAC Secretariat also signed the non-binding IEC, the partner states could choose to advance their interests in the ECT process as a bloc, and avoid individual state engagement, given the power dynamics involved in the process.
6. Environmental, climate, consumer, development, and trade related civil society groups, as well as trade unions in Africa should mobilize citizens into a campaign to reject the ongoing expansion of the ECT into the continent unless the rules are rewritten. People and the environment must come before profits.

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SEATINI Uganda
Plot 806, Block 213, Bukoto - Kisaasi Road
P.O BOX 3138, Kampala
Tel: +256 414 540 856
Email: seatini@infocom.co.ug
Website: www.seatiniuganda.org