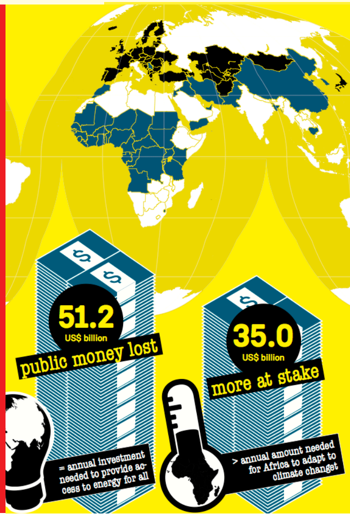
THE ENERGY CHARTER TREATY (ECT) AND THE IMPLICATIONS OF UGANDA'S INTENTION TO ACCEDE TO THE TREATY.



Background.

Energy poverty remains a persistent challenge in African economies, despite the crucial role that energy access plays in the realization of the Sustainable Development Goals (SDGs) particularly Goal 7 that centers on access to affordable, reliable, sustainable and modern energy. In 2022, 600 million people in Africa, or 43% of the continent, lacked access to electricity.[1]

Access to reliable and affordable energy is not only vital for basic human needs such as lighting, cooking, and heating, but it is also a key driver of inclusive growth. African countries recognize the significance of overcoming energy poverty and are actively seeking mechanisms to address this issue. However, the task is daunting as investment in the energy sector is often expensive. 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 Energy Charter Treaty (ECT) is multilateral agreement that was signed in December 1994 and enforced in April 1998. It serves as a multilateral framework for promoting trade and investment in the energy sector. By emphasizing key principles such as open and non-discriminatory energy markets the ECT encourages foreign direct investment. Currently, the ECT has 56 Signatories and Contracting Parties, including the European Union, as well as various states in Asia and Africa, as of April 1, 2021.

The primary goal of the ECT is to establish a legal framework that facilitates international cooperation in the energy sector. This framework encompasses all aspects of commercial energy activities, such as trade, transit investments, and energy efficiency. The treaty's intention is to enhance the rule of law in the global energy sector and provide member countries with a comprehensive platform to address challenges related to access to modern energy.

Energy poverty remains a persistent challenge in African economies, despite the crucial role that energy access plays in the realization of the Sustainable Development Goals (SDGs) particularly Goal 7 that centers on access to affordable, reliable, sustainable and modern energy. Uganda set an ambitious agenda to develop its substantial energy and mineral resources with the aim of promoting economic development, ending energy poverty. The Uganda Vision 2040 states that Ugandans aspires to have access to clean, affordable, and reliable energy sources to facilitate industrialization. This commitment was further reaffirmed in the Third National Development Plan (NDP III) (2020/21 to 2024/25), which prioritizes increased access and consumption of clean energy to foster improved stock and quality of productive infrastructure. By joining the ECT, the Government aims to align its energy development goals with a global framework that could attract potential FDIs in the energy sector.

Current state of play and new emerging trends on the ECT In recent years, a growing number of contracting parties including France, Italy, Spain, Germany Luxemburg, Poland, have submitted their withdrawal or announced plans to withdraw from the ECT[2] . The key drivers for these withdrawals are the burgeoning number of law suits, inexplicable hefty fines against states and

1 https://www.worldbank.org/en/region/afr/overview
2 https://www.argusmedia.com/en/news/2380679-spain-prepares-to-leave-energy-charter-treaty

the use of the ECT by investors to derail policies aimed at protection of the environment and climate action. In response, the ECT secretariat amidst objections from several contracting parties and other stakeholders has proposed to modernize the treaty to harmonize the growing controversy and align the ECT with the Paris agreement and other environmental objectives. Premised on this failure, the European Commission, on the 7th July 2023 proposed a council decision that will be presented the council of the European Union for joint exit from ECT by the EU and its member states in a coordinated manner if adopted. [3]

European Commission propose ECT exit after climate concerns

Remaining a Contracting Party to the current, modernized ECT is not an option for the EU or its Member States, as the current, modernized Treaty is not in line with the EU's investment policy and law and with the EU's energy and climate goals.

The provisions of the Treaty as regards investment protection, including the investor-to-State dispute settlement (ISDS) mechanism, are not in line with the EU approach to investment protection. In particular, the un modernized ECT is incompatible with the principle of autonomy of Union law, as it does not include some of the safeguards identified by the Court in the CETA opinion in order to conclude that the arbitration awards would not have the "effect of preventing the EU institutions from operating in accordance with the EU constitutional framework". In addition, the protection granted to fossil fuels, under the conditions described above and for an unlimited period of time, does not fit with EU objectives as defined in the European Green Deal, the REPowerEU Plan or the Climate Law – namely: to accelerate the shift away from fossil fuels and towards renewable energy, to achieve a greater energy independence, ensure the EU's energy security, and, not least, deliver on the commitment to cut emissions by at least 55% by 2030 and to reach climate neutrality by 2050.

As a result, the withdrawal of the EU from the ECT is the only available solution.

The failure to adopt the modernized package[4] between EU and ECT secretariat, has prompted the secretariat to embark on the silent expansion to countries in the global south[5].

The secretariat is persuading countries with vast energy resources particularly in Africa, the middle East ,Asia and Latin America to join the ECT with the promise to attract investors in the energy sector and solve energy poverty [6] However these countries are more vulnerable to being sued for huge amounts of money under the ECT. Firstly, they currently experience a disproportionate share of the effects of climate change and thus more likely to be sued for the introduction of policies aimed at protecting the environment. Secondly they do not have enough resources to dedicate to the expensive arbitration proceedings in the event that they are sued under the ECT.

Uganda's Journey towards becoming an ECT contracting party.

Since 2012, the ECT secretariat has been putting significant effort into expanding its geographical reach targeting countries with vast energy resources particularly in Africa, Middle East, Asia and Latin America in this regard, Uganda together with other East African Countries such as Burundi and Tanzania signed the non-legally binding International Energy Charter (IEC) in 2015. Consequently, the ECT secretariat continued to lobby these countries to take additional steps towards acceding to the treaty and following the signing of the non-binding IEC.

On 6th December 2019, the government of Uganda through the Ministry of Energy and Mineral Development sent an "Accession Intention Letter" to the secretariat informing them of the country's intent to join and ratify the treaty. [7]With Uganda signing the IEC and sending the letter of intention to accession to the ECT secretariat, it is now certain that Uganda could become a contacting party to the ECT.

Currently, Uganda's Ministry of Energy and Mineral Development (MEMD) is directing the accession process with support from the Ministry of Justice and Constitutional affairs in drafting the accession reports. 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,

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4 Modernized package the reviewed text of the ECT and annexes shared in August 2023. This however was not adopted due to abstention of the minority blocking group in November 2022.

5 https://corporateeurope.org/en/2020/04/silent-expansion

6 https://www.business-humanrights.org/en/latest-news/silent-expansion-will-the-worlds-most-dangerous-investment-treaty-take-the-global-south-hostage/

7 https://www.energycharter.org/who-we-are/members-observers/countries/uganda/

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.

It's worth noting that the process accession and preparation of the subsequent reports is generally secretive with non-participation of key stakeholders, including the academia, civil society organizations, legal practitioners and lacks oversight of the parliament of Uganda. This non-participation of the stakeholders does not help the situation, as the concerned officials may not decipher the political, legislative, and financial risks that may accrue to government arising from accession and eventual ratification of the treaty. With the expression of interest to accede to the ECT in 2019, Uganda is in the same league with Cambodia, Colombia, Niger, and Gambia – countries that currently preparing the accession reports which are subject to approval of the by the energy charter conference.[8]

While Uganda's invitation to participate in the secretariat's process faced a momentary hold attributed to the pending modernization of the treaty negotiations concluded in 2022 continued to participate in select joint activities with the secretariat.

For instance Uganda has participated in all editions of the Energy Investment Risk Assessment (EIRA) since its initial official launch in 2018 and Uganda has confirmed its participation in the EIRA assessment in 2023 given its Observatory status.[9] In the bid to enhance pathways for economic and social development and the improvement of the energy sector a delegation of Members of Parliament led by the Deputy Speaker of Parliament on 30th March 2023 agreed to enhance cooperation between the Government of Uganda and the ECT Secretariat, including considering proposals for joint activities and exploring various areas of cooperation.[10] However, despite the above, the current status of Uganda's intention to accede to the Energy charter treaty is currently unclear.

Will signing the ECT make a difference in terms of coverage of investment protection in Uganda?

The investment provisions of the 1994 ECT bear much resemblance to the traditional bilateral investment treaties (BITs) that have faced significant criticism over the past two decades.[11] To date Uganda has signed over 17 BITs which contain similar terms like the ECT currently only six (6) BITs – that with Germany, Switzerland, United Kingdom, Netherlands, Denmark and France – remain in force.[12] In addition, Uganda has entered into other investment and trade agreements with the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA), of which Uganda is a member.

8 https://www.tni.org/files/publication-downloads/one_treaty_to_ruled_them_all.pdf

9 Acknowledgement of Uganda's participation in EIRA 2020 Report retrieved from https://www.energycharter.org/file-admin/DocumentsMedia/Other_Publications/EIRA_2020.pdf

10 The Delegation led by the Deputy Speaker of the Parliament of Uganda pays a courtesy visit to the Secretariat retrieved from https://www.energycharter.org/media/news/article/the-delegation-led-by-the-deputy-speaker-of-the-parliament-of-ugan-da-pays-a-courtesy-visit-to-the-se/

11 Expansion of the Energy Charter to Africa and Asia: Undoing Reform in International Investment Law? https://www.iisd.org/system/files/publications/iisd-itn-june-2017-english.pdf

12 See list of Uganda BITs available on: https://investmentpolicy.unctad.org/international-investment-agreements/coun-t[illegible]/218/uganda

It is worth noting that in October 2014, the EAC finalized the negotiations for a region-to-region Economic Partnership Agreement (EPA) with the European Union (EU). The EPA establishes a free-trade agreement between the EU and developing economies in sub-Saharan Africa. However, with exception of Kenya, the EPA has not been ratified by the EAC as Tanzania opposed its ratification citing the need to study the EPA's impact on domestic Industries.

Nonetheless, there is no unambiguous evidence that those BITs bring investment to contracting countries. Qualitative research suggests that for most investors, investment treaties are not a decisive factor when they go abroad.[13] Available data on the Uganda FDI portfolio source in the FY 2019/20 show that China, India, and Kenya top the list at 23.8%, 11.7% and 3.5%, respectively, although Uganda has no BITs in force with these countries. On the other hand, countries like United Kingdom stand and Netherlands with whom Uganda has BITs stand at 3.5% and 1.5%, respectively.[14]

It is worth noting that many countries are actively terminating Bilateral Investment Treaties (BITs) that include Investor State Dispute Settlement (ISDS) clauses . Interestingly , the termination of these treaties has not had a negative impact on the Foreign Direct Investment (FDI) stock. Countries such as South Africa decided in 2010 to terminate 20 BITs. FDI stock increased 10 percent since that time, from 1.8 trillion rand to 2.0 trillion rand. After South Africa terminated its BIT with Germany in August 2014, FDI stock from Germany in South Africa increased from an annual average of 93 billion rand before termination to 95 billion rand after termination[15].

Myths and Realities of Signing the ECT.

MYTH	REALITY
The ECT increases foreign investment	There is no evidence that the ECT attracts investment. Neither analysts nor investors nor government officials consider investment treaties as important drivers of investment decisions.
The ECT promotes rule of law.	The ECT undermines the rule of law. It supports a secretive and biased legal system accessible to only foreign investors and can undermine court systems that are actually based on rule of law.
The ECT is the only way to protect energy investors abroad, particularly in countries with weak judicial systems .	Investors have numerous options to protect their investments abroad, but the ECT is the most attractive because it can act like a cash machine for them .In any case, countries with weak judicial system are not the main target for investor law suits .
State win the majority of ECT cases.	The majority of ECT cases lead to unfavorable results for the claimant investors in almost 60% of resolved cases, investors either received monetary compensation or other concessions as part of a settlement. In addition there is an abundance of cases that never went to arbitration because investors already got what they wanted by threatening an expensive claim ,further demonstrating the pro-investor nature of the ECT .
Modernization of the treaty will bring the ECT in line with climate goals	The chances that the ECT modernization would bring the treaty in line with climate action is extremely low. The proposals currently on the table will continue to protect fossil fuels from government regulation. And because amendments to the treaty require unanimous agreement from all members , only cosmetic changes are expected.
The ECT brings access to modern energy services and reduces energy poverty	While there is no evidence that the ECT will bring additional investment, future ECT member states risk costly law suits in private arbitration tribunals for decades and severe constraints when it comes to reversing privatizations or regulating energy prices .

13 Jonathan Bonnitcha (2017) Assessing the Impacts of Investment Treaties: Overview of the evidence, https://www.iisd.org/sites/default/files/publications/assessing-impacts-investment-treaties.pdf

14 Uganda Investment Authority (2020). Annual Investment Abstract for FY 2019/2020. Available on https://www.ugandainvest.go.ug/wp-content/uploads/2021/09/UIA-Annual-Investment-Abstract-FY-2019_2020_Final.pdf.

15 Termination of Bilateral Investment Treaties Has Not Negatively Affected Countries' Foreign Direct Investment Inflows https://www.citizen.org/wp-content/uploads/pcgtw_fdi-inflows-from-bit-termination_1.pdf

Implications of Uganda acceding to the Energy Charter Treaty:

Investor-state dispute settlement (ISDS): The ECT includes an ISDS mechanism that allows foreign investors to bring claims against member countries with a provision for the arbitration to be done in international tribunals which is likely to be expensive. While this mechanism offers investor protection, it can also expose countries to potential legal challenges and financial liabilities. Therefore, Uganda joining the ECT would expose her to a risk of expensive law suits by the investors

Compensation for losses: Article 12(1) of the Energy Charter Treaty (ECT) states that if an investor from one contracting party suffers a loss in the territory of another contracting party due to war, armed conflict, national emergency, civil disturbance, or similar events, the host contracting party must provide the investor with the most favorable treatment in terms of restitution, indemnification, compensation, or settlement.

This provision implies that the government of the host country can be held liable for losses incurred by foreign investors in situations beyond its control, potentially exposing the government to financial liabilities and legal challenges. These protection provisions may not even be accorded to local investors and invite unnecessary liability to government.

Uncertainty surrounding withdrawal from the ECT (Zombie clause): The ECT has faced criticism due to concerns over its withdrawal mechanism. Since provisions of the treaty continue to apply to investments made in the area of the contracting party by investors of other contracting parties for a period of 20 years from effective date of withdrawal. This implies that if a country exits the ECT, it's still bound by the terms of the treaty for the next 20 years.

Potential loss of sovereignty: The ECT can be used to impede any type of regulation on energy investments. It allows contracting parties to take any measure necessary for protection of health and environment only if those measures do not compromise its terms of compensation in Article 12of the treaty.

Acceding to the ECT would lock the country into failures of privatization. Acceding to the Energy Charter Treaty is likely to lock Uganda into failures of privatization in the energy sector. The ECT is grounded in a private sector led strategy for energy development, promoting open and competitive energy markets. Following the privatization of Uganda's electricity utility in 2004, the company UMEME LTD which was granted a concession agreement to operate the business of electricity distribution, failed to fulfill its obligations and instead UMEME hiked electricity prices significantly making it unaffordable for many Ugandans. Despite the lack of regulation and the company's failure to meet the terms of the agreement, the government cannot rationalize the network due to heft compensation it would have to pay. Similar experiences with privatization in other countries have led to increased electricity bills and reduced access for those with lower incomes. Reversing failed privatization could allow governments to regain policy space, price regulation, infrastructure investment and fair conditions for workers. However, the ECT can impede regulation on energy investments including the regulation on energy tariffs making it harder for governments to address affordability issues. Accession to the ECT may further hinder the government's ability to untangle itself from the problematic failures of privatization in the energy sector.

In conclusion, Uganda's intention to accede to the Energy Charter Treaty (ECT) presents a range of implications that require careful consideration. Whereas the ECT in a nutshell seeks to promote trade and investment in the energy sector, the potential risks and challenges for the country could reverse the progress so far registered. The government should halt any processes aimed at acceding to the treaty and not ratify it.

Recommendations.

Uganda should prioritize the domestication of its investment laws and policies to regulate investments in the public interest and protect against investor exploitation under the Investor State Dispute Settlement clauses of the Energy Charter Treaty. By establishing clear guidelines and standards, Uganda can promote sustainable economic growth. The government should also actively participate in the operationalization of the EAC model investment treaty to harmonize its investment laws with other East African community member states and ensure its specific concerns are addressed This will strike a balance between protecting investors and safeguarding national sovereignty and development objectives.

As the ECT has a prefix of enhancing the rule of Law to boost FDI, studies of South and South East Asian countries have proven that effectiveness and independence of the countries Judicial system and competitive regulatory environment have direct effect on Investor confidence rather than use international treaties.[16] Therefore, Uganda as a country should embark on streamlining the effectiveness of the judicial and legislative system to boost investor confidence. This can be achieved through adequate funding to the judiciary curbing corruption and strict adherence to the rule of law, empowering the judiciary develop mechanisms to reduce the time frame for hearing of Investor disputes especially under the Commercial Division of the High Court.

Urgent need for the review of the Ratification of Treaties Act (1998) to increase and employ the power of Parliament's oversight role. The Act as it is limits oversight of the entity to ratify treaties only in line with armistices and peace making. This limitation creates a vacuum for oversight on investment treaties signed on behalf of the citizens. Further still, the current process of ratification is not guided by any statutory instruments inform of regulations but rather guided by administration procedure[17] that could cause connivance with lobbyist and investors at the expense of the citizens.

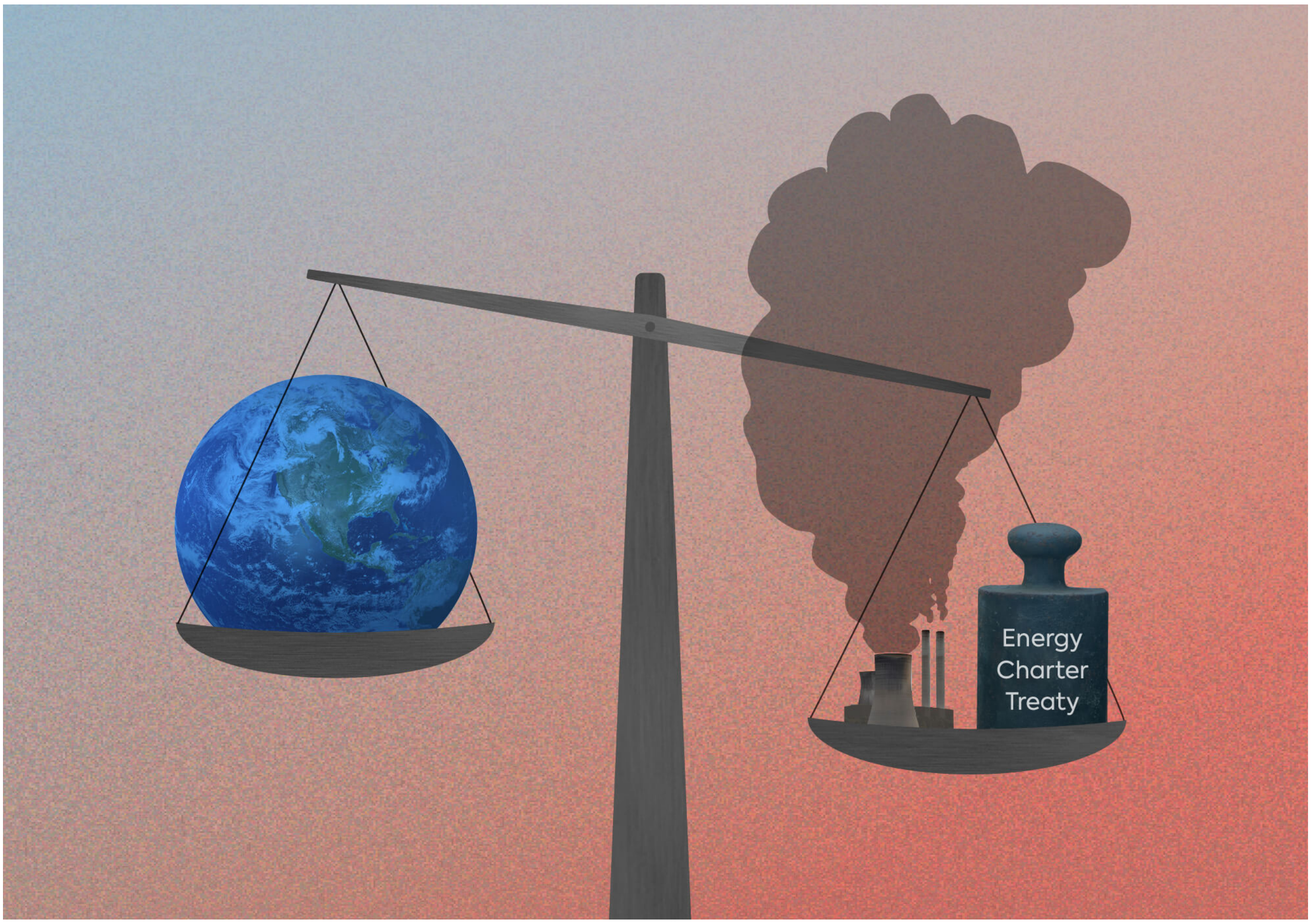
The need for Parliament of Uganda push Ministry of Foreign Affairs to annually publish all agreements and to establish a depository. Despite provision within the existing laws particularly Section 5 of RTA and Rule 40(3) of the Rules of Procedure for parliament requiring the Ministry of Foreign Affairs to create depository of all treaties and at the same time update the parliament on implementation of the treaties every 2 years During the 24th Sitting on April 6th 2023[18], Parliament recognized that this has not been the practice over the years. This has further derailed parliament oversight and has caused automatic renewal of unfavourable treaties that continue to favour investors over countries interest.as seen in existing Bilateral Investment Treaties (BITs)..[19]

16 Effect Judicial Independence on the Foreign Direct Investment in South and South-East Asian Countries retrieved from https://assets.researchsquare.com/files/rs-171730/v1_covered.pdf?c=1631853096

17 Uganda process on Ratification of Treaties retrieved from https://unece.org/sites/default/files/2022-02/RATIFICATION%20PROCESS%20IN%20UGANDA.pdf

18 Hansard on 24th Parliamentary sitting retrieved from https://www.parliament.go.ug/cmis/views/52c7b0a0-b4f7-45b6-b307-4a0247ae1ee7%253B1.0

19 The Uganda – Netherland treaty was meant to expire by 2017 however its application is still in force for the next 10 years premised on an automatic renewal clause that bids Uganda until 2027. Despite Uganda agreement for re-negotiation of the treaty with latter, the current status remains unknown.



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