

The Energy Charter Treaty

An unsustainable risk

February 2023

- Germany, France, the Netherlands, Spain, Poland, Slovenia and Luxembourg have all recently announced they are leaving the Energy Charter Treaty.
- The European Commission is recommending a co-ordinated withdrawal of the whole EU.
- Fossil fuel companies are already using the Energy Charter Treaty to challenge climate action and sue for billions of taxpayers money. The risk of such cases is growing.
- The countries leaving say that attempts to reform and ‘modernise’ the treaty have failed.
- The UK should take the decision to exit the Energy Charter Treaty to protect taxpayers, the planet and our future.

What is the Energy Charter Treaty?

The Energy Charter Treaty (ECT) is an investment agreement between 50 countries specifically for the energy sector. It dates back to the mid 1990s, from a time when the focus was on access to oil and gas reserves in countries of the former Soviet Union, and levels of climate ambition were not high.

At the core of the ECT is the contentious investor-state dispute settlement (ISDS) mechanism. This allows foreign companies to sue governments outside of the national legal system in secretive tribunals. The amounts at stake can be in the billions. The ECT has already generated at least 135 claims, making it the world’s most litigated ISDS agreement.

ISDS has been a controversial issue in trade negotiations, including post-Brexit trade deals. ISDS was dropped from the UK-Australia trade deal, and the [UK government’s own outline approach](#) for a future UK-Canada deal specifies that it will “ensure the agreement does not contain an investor state dispute mechanism” (p23). Yet the UK is already exposed to the risks of ISDS through its membership of the ECT.

Fossil fuel cases

UN climate scientists warned in the [most recent IPCC report](#) of the risk of “ISDS being able to be used by fossil-fuel companies to block national legislation aimed at phasing out the use of their assets”, highlighting the Energy Charter Treaty (p14-81).

This is not just a potential risk; there have already been several high-profile cases of fossil fuel companies suing:

- [RWE vs Netherlands](#) and [Uniper vs Netherlands](#): Both companies are suing the Netherlands over coal phase-out. They were offered compensation but are seeking much larger amounts via ISDS - RWE wants €1.4 billion and Uniper up to €1 billion. The cases are pending.
- [Rockhopper vs Italy](#): UK oil company Rockhopper won a case this summer against Italy over a ban on offshore oil drilling. It won over £210m - more than six times what it had spent on the project.
- [Ascent vs Slovenia](#): UK fracking firm Ascent Resources launched legal action against Slovenia 2019 over requirements for an environmental impact assessment and now also over a subsequent ban on fracking introduced by parliament. The case is pending.

Multiple studies predict that a lot more cases will arise in future as states take more ambitious steps to phase-out fossil fuels.

Threatening climate action

The Energy Charter Treaty poses a threat to climate action, particularly in two ways:

Increasing the cost of climate action

Recent research shows that if the UK follows the International Energy Agency's recommended pathway and cancels oil and gas projects in the pipeline, it could face legal claims of up to £9.4 billion from the ECT alone. Globally the risk is up to \$111.5 billion.

Regulatory chill

The most recent IPCC report warns of the risk of "regulatory chill" from investment agreements, particularly highlighting the Energy Charter Treaty (p14-72 & 14-81). This is when the fear of being sued causes governments to delay or decide against taking action that is needed on climate. Last year, two countries acknowledged this was already happening.

Countries exiting following failed reform

Towards the end of 2022 there was a cascade of announcements from countries that they are planning to exit the Energy Charter Treaty. Germany, France, the Netherlands, Spain, Poland, Slovenia and Luxembourg have all said they are leaving. Italy has already left. The European parliament has voted for a coordinated withdrawal of all EU countries, and the European Commission is now recommending this.

This follows initial attempts to address the problems of the ECT by reforms. A 'modernisation' process was initiated in 2017, and eventually last year a limited package of proposals was put together. However, the proposals are weak:

- existing fossil fuel projects will remain protected for at least ten years – more if the changes take a

while to enter into force, and some gas projects will be protected until 2040;

- new investments will not be protected after August 2023, but projects that have just been given new or extended licences, like the Cambo oil field, will be protected;
- all of the existing cases can still continue.

The countries leaving are doing so saying that the reform has been a failure and that exit is the better option. Germany, France, the Netherlands, Spain and Slovenia have all referred to the incompatibility of the ECT with the Paris Climate Agreement and climate goals. Most recently the EU Council has decided it will not support the reform.

If countries exiting the ECT do so in coordination, they could agree not to apply the 20 year 'sunset clause' between each other, which would remove much of the sting in the tail. This has been suggested by several of the countries leaving.

In June, the then energy minister, Greg Hands, said:

"The UK cannot support an outdated treaty which holds back investment in clean energy and puts British taxpayers at increased risk from costly legal challenges."

(Press release 24/6/22)

Back then, the UK wanted to put its trust in the reform proposals to fix the problem. But country after country has done their assessments and concluded the reform has failed, and now it seems likely that the flawed proposals will not even pass. If the UK does not step up and become part of the vanguard for the exit, it could be left behind in an obsolete and collapsing treaty, bearing all the risk, while others move on.

The UK should take the decision to leave the Energy Charter Treaty, ideally as part of a coordinated withdrawal. It is the most effective way to protect taxpayers, the planet and our future from this damaging treaty.

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