

The Energy Charter Treaty - a climate threat



- Fossil fuel companies are already using the Energy Charter Treaty to challenge climate action and the risk of such cases is growing. The IPCC has warned of “regulatory chill”.
- Attempts to reform and ‘modernise’ the treaty have failed to make it compatible with international climate goals.
- A co-ordinated withdrawal from the ECT by the UK and others would be the most effective way to ensure the treaty cannot continue to pose a threat to climate action.

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Yet as a result of its continued membership of this increasingly outdated treaty, the UK is already party to the problems of ISDS.

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](#) are both suing the Netherlands over coal phase-out. Both 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 is suing Italy over a ban on offshore drilling within 12 nautical miles of the coast, introduced after public campaigning. The verdict is expected soon.
- [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:

1) **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 £11 billion. 70% of this risk to the UK comes from the Energy Charter Treaty. Globally the amounts could reach \$340 billion. This is a cautious estimate and other estimates have been in the trillions based on the value of 'stranded assets'.

2) **Regulatory chill**

The most recent [IPCC report](#) warns of the risk of "regulatory chill" from investment agreements (p14-72). This is when the fear of being sued causes governments to delay or decide against taking action that is needed on climate. Earlier this year, two countries [acknowledged this was already happening](#) - Denmark set climate targets later than the science tells them for fear of being sued and New Zealand did not join one of the initiatives at COP26. It is likely that the effect is far more widespread. Developing countries are particularly at risk from the high costs involved.

Failed reform and exiting the ECT

As a result of the growing recognition of the problems of the Energy Charter Treaty a 'modernisation' process was initiated. However after fourteen rounds of negotiations, this reform has failed to make the ECT compatible with global climate goals.

Fossil fuel investments are set to receive continued protection under the ECT throughout the critical years of the energy transition. Existing proposals by the UK and by the EU would maintain fossil fuel protection until the mid 2030s for existing investments and possibly up to 2040 for new investment in certain gas related infrastructure. Even these proposals are too much for others, who want to water them down further. Yet aligning the ECT with international climate goals requires the immediate end of investment protection for fossil fuels.

A decision point is approaching, with an Ad Hoc Conference of the ECT on 24 June to assess the result of the negotiations ahead of the ECT's annual meeting in November.

A [consensus is growing](#) among many countries that the modernisation process does not and can not align the ECT with international climate goals. Germany, the Netherlands, Poland and Spain wish to explore a 'co-ordinated withdrawal' from the Treaty and others have expressed support for this. If the UK does not step up and get involved, it could be left behind in an obsolete and high risk treaty while others move on.

A co-ordinated withdrawal from the ECT by the UK and other member states who share the same ambition to ensure climate policies are not undermined would be the most effective way to ensure the treaty cannot continue to obstruct the phase-out of fossil fuels.

Suggested question

The ECT is a shared responsibility between DIT and BEIS. A key question for the ministers is:

- Will the UK take steps to exit the Energy Charter Treaty, as part of a coordinated withdrawal, because it is clear that reform proposals have failed and it is not possible to make the ECT compatible with international climate goals?

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