

Investment arbitration against climate policy: introduction to the Energy Charter Treaty

Background information

MEP Anna Cavazzini - 14.11.2019

In December 2019, the member countries of the little-known Energy Charter Treaty will begin negotiations to modernise the agreement. The results of this process will have a significant impact on the EU's ability to end its dependence on fossil fuels and to address the climate crisis in a meaningful way.

Currently, investment treaties and other agreements like the Energy Charter Treaty protect companies that still invest in dirty energy. They enable arbitration lawsuits against states that are pushing ahead with the phase-out of fossil fuels. The EU and member states must work as hard as possible to put an end to these investment courts, and prevent billions of euros of taxpayer money to fly in the pockets of fossil fuel companies.

What is the Energy Charter Treaty?

The Energy Charter Treaty (ECT) is an international agreement concluded in the mid-1990s. The treaty currently applies to **53 countries**, from Western Europe to Central Asia to Japan, as well as to the EU and the European Atomic Energy Community. The treaty includes ISDS (investor to State Dispute Settlement), the infamous arbitration tribunals that were at the heart of the Green's critique of TTIP and CETA. The Energy Charter Treaty therefore gives **companies in the energy sector** enormous powers to sue states in international investment courts, for uncapped amounts (past cases went up to several tens of billions dollars), for example if governments decide to stop new oil or gas pipelines, withdraw drilling permits or exit coal.

No other international trade or investment agreement in the world has triggered more investor lawsuits than the Energy Charter Treaty. The number of claims has exploded in recent years. While only 19 cases were registered in the first 10 years of the agreement (1998-2008), 103 investor lawsuits were filed in the last seven years alone (2013 to current). This trend is likely to continue.

Large oil, gas and coal companies

The ECT is a powerful tool in the hands of large oil, gas and coal companies to dissuade governments from making the transition to clean energy. It is also a form of public insurance for their future stranded assets, as current investments in fossil fuels are protected. Here are some examples of documented cases:

- **Rockhopper** has sued Italy for its refusal to grant a concession for oil drilling in the Adriatic Ombrina Mare field. The rejection came after the Italian parliament banned

all new oil and gas activities off the country's coast in 2016, amid environmental problems, high earthquake risks and strong rejection of the projects by local residents.

- France softened its climate protection laws that meant to restrict natural gas and oil production following a threat of legal action based on the ECT by Canadian company **Vermilion**.
- The company behind the **North Stream 2** gas pipeline threatens to sue the EU for billions if it is not allowed to avoid new rules in the EU gas directive.
- In autumn 2019, **Uniper**, a German company owning and operating the second largest power plant in the Netherlands, threatened the country with a case under the Energy Charter Treaty in response to the Dutch government's decision to ban coal-fired power generation until 2030. This case could be one of the first ISDS lawsuit explicitly against a climate policy, after the Keystone XL lawsuit against the US and Westmoreland Coal against Canada. Anti-coal policies in Poland and the UK have also been attacked using the ECT, but little is known about the cases.

The treaty is also an incredible lobby tool, it gives corporations leverage in their advocacy efforts. For example, **Vattenfall's** legal attack on the environmental standards for a 1.4 billion euro coal-fired power plant in Germany forced the local government to relax environmental rules to settle the case.

Modernisation process

In July 2019, the Commission received a mandate from the Council to start negotiations on “modernising” the ECT. The first negotiation session will start **on December 10, 2019** in Albania.

References to the transition to clean energy and compliance with the Paris agreement are part of the Commission's negotiating directives, but in very weak terms. The mandate keeps all doors open to billions euro claims by fossil fuel companies, and does not end the protections given to new investments in dirty energies. The extremely broad special rights given to investors remain barely touched, and will still allow cases against legitimate climate policies.

At a time when the financing of the energy transition is a top priority, and when funding is one of the main obstacles to the coal exit, not a single cent of public money should flow into the pockets of companies responsible for the climate crisis because of arbitration tribunals.

Withdrawal from the Energy Charter Treaty

Civil society organisations go much further than the limited modernisation process started by the Commission. They call on Member States and the EU to exit the Treaty as soon as possible.

Article 47 of the Charter states that the Parties may withdraw at any time by written notification to the Secretariat. The revocation becomes effective after one year. Italy has decided to withdraw, and officialised it in its Budget Law in 2015. It is no longer a member

of the Treaty. While countries can still be attacked 20 years after their withdrawal (!), at least new dirty investments are not protected anymore.

On 4 September 2019, Luxembourg's Energy Minister Claude Turmes declared that his country would push for a radical reform of the Energy Charter Treaty in the EU. The Luxembourg government is trying to build a coalition of climate-friendly countries to reform the treaty and adapt it to the objectives of the Paris Agreement. In the Minister's view, the withdrawal is an option worth taking seriously in a few months' time, if the discussion on modernisation do not move forward fast enough.