



CAN Europe position paper on the Energy Charter Treaty

Climate Action Network (CAN) Europe is Europe's leading NGO coalition fighting dangerous climate change. With over 160 member organisations from 35 European countries, representing over 1.700 NGOs and more than 40 million citizens, CAN Europe promotes sustainable climate, energy and development policies throughout Europe.

1. Introduction

The Energy Charter Treaty (ECT) is an investment treaty from the 1990s. It contains an arbitration mechanism known as Investor-State-Dispute-Settlement (ISDS) that allows a private investor to sue a state for any behaviour that harms their economic interest, including legislating in the public interest. Arbitration panels can award millions, sometimes billions of Euro in compensation. The ECT is the most frequently invoked International Investment Agreement with 128 publically known casesⁱ. The actual number is likely to be higher because there is no obligation to make cases public.

The ECT has 53 signatories, including almost all European countries, Turkey, and Central Asia. It is therefore highly relevant to CAN Europe members, even those outside the European Unionⁱⁱ.

2. Why we find the ECT problematic

The ECT is a hindrance to the clean energy transition, because:

1) It gives energy companies the opportunity to challenge climate policies

The ECT grants fossil fuel companies the opportunity to sue governments for measures to phase out fossil fuels. It grants extensive protection not only from direct expropriation but also from other state actions that negatively impact the companies' profits, such as regulatory changes. Energy firms have used the ECT for instance to challenge environmental standards, measures to alleviate fuel poverty, cuts in subsidies and changes in taxes. Recently, we have also seen a number of clashes between the ECT and actions to tackle climate change:

The British energy firm Rockhopper is currently suing Italy for banning new oil and gas drilling operations near the coastlineⁱⁱⁱ. France was threatened with an ECT claim by Canadian company Vermilion when France was considering a law to end fossil fuel extraction^{iv}. Subsequently, the law was significantly watered down. In September 2019, the German owner of a coal-fired power plant blackmailed The Netherlands with an expensive lawsuit under the ECT^v. The Dutch parliament is currently deciding on a law to phase-out coal by 2030 and is put under pressure by the company's potential claim.



The prospect of having to pay out enormous amounts in compensation to fossil fuel companies could dissuade governments from taking decisive action on climate change. As the Vermilion example above shows, even the threat of a case can be enough to influence proposed laws or regulations in support of the energy transition. The ECT is therefore a powerful tool in the hands of fossil fuel firms.

Most governments are only just starting to implement their climate commitments. It is inevitable that significant changes to the energy sector will have to be made to reach climate neutrality. We therefore expect further lawsuits under the ECT if governments don't act.

2) Companies can receive excessive amounts in compensation under the ECT

Arbitration panels can award huge amounts of money to investors. Up to 2018, governments have been ordered to pay at least \$US51.2 billion in damages to investors in ECT disputes. This only includes figures from disputes where this information has been made public. At least \$35 billion is still at stake in ongoing disputes that are publicly known^{vi}.

In several cases, the sums awarded by far exceeded the companies' investment because under the ECT they are entitled to compensation for future hypothetical profits that they could have made without a change in regulation. Rockhopper, for instance, is demanding up to \$350 million in compensation according to Rockhopper's CEO Sam Moody, even though they only invested \$40-50 million^{vii}.

The huge amounts arbitration panels can award could make the clean energy transition excessively expensive and difficult to ignore for decision makers. The ECT puts a high price tag on climate policies, which makes it a lot harder to implement them.

3) Arbitration procedures are deeply flawed

Investor claims under the ECT are not decided by independent courts but by private arbitration panels, bypassing national courts and removing disputes from their competence. Arbitration panels consist of three investment lawyers. These arbitrators are paid on a case-by-case basis, which gives them a financial incentive to inflate the number of cases. It is therefore unsurprising that the provisions in investment agreements have consistently been interpreted in an investor-friendly way^{viii}.

Since the ECT foresees no institution that could correct the interpretation of arbitration panels, the system is effectively out of any democratic or even legal control. Governments have set it up but can do little to take back control since any change of the Treaty would require unanimous support from all ECT members. There is also no appeal mechanism, so once a ruling has been made, it is final. If the state does not pay out, awards can be enforced in any country worldwide by asking a local court to confiscate state assets.



4) The ECT can be used by letterbox companies to file a claim

We have seen several cases where companies from non-ECT member states have filed ISDS claims under the ECT. Examples include a Canadian company – Khan Resources – that sued Mongolia via a letterbox in The Netherlands. More recently, Russian-owned Nord Stream 2 sued the EU via a letterbox in Switzerland. In some cases, companies have used subsidiaries in other countries to sue their own state, for instance, two rich Spanish businessmen suing Spain, the well-known Turkish Uzan family suing Turkey or Ukrainian billionaire Kolomoisky suing Ukraine. This shows how the ECT is a tool in the hands of the super-rich and multinational corporations. It also multiplies the possibilities for ISDS claims that are a danger to climate action.

5) The ECT can be used to attack measures to make energy affordable and put it under public control.

Hungary and Bulgaria have been sued under the ECT because they took steps to curb the profits of energy companies or lower electricity prices for consumers respectively^x. ECT provisions can also be used against initiatives to bring energy production and services under public, democratic ownership and control and reverse the negative impacts of failed energy privatisations^x.

Why the ECT is no good news for renewable technologies either

The ECT has also been used by investors in renewable electricity but this is no reason to embrace it. The flaws identified above also count for ECT cases that concern renewable energies. This is illustrated by the over 50 cases filed against Spain after the country made changes to its feed-in tariff scheme. 88% of these claims were made by financial investors, not renewable energy firms^{xi}.

Most of these 50 cases have not been decided yet. All together, the claims against Spain add up to US\$7.3 billion^{xii}. In one case that has already been decided, UK equity fund Eiser received €128 million in compensation^{xiii}. This included compensation for profits the company would have made in a hypothetical scenario without any subsidy cuts over a 25-year lifetime of the plant! This is particularly indecent, given that the plant continues to make money even after the cut in subsidies^{xiv}.

Such indecent and unjustifiable amounts – that the taxpayer has to pay – are a danger to climate policies. First of all, they might dissuade governments from new subsidy schemes that are urgently needed to advance the clean energy transition. Secondly, governments must be able to adapt subsidies to continuously foster the most climate-friendly technologies. There has been a lot of innovation in the field of renewable energies and governments must not be hindered to respond to future innovations with policy changes.



Thirdly, the ECT does not allow regulators to discriminate between different sources of energy. This could even lead to claims from fossil fuel companies against measures that favour renewable investments^{xv}.

Finally, in the Eiser vs. Spain case, the arbitration panel ruled the investor's "legitimate expectation" was violated because the "prior regulatory regime" was "replaced by an entirely new regime". Considering "an entirely new regime" in the energy sector is exactly what we need to save the planet, this interpretation of the ECT is very dangerous for any government wanting to take decisive climate action.

3. CAN Europe demands

We therefore urge all members of the ECT in Europe to:

1) Take steps to ensure that the ECT can no longer be used to undermine climate policies.

In order to eliminate the grave risks of the ECT for the climate, the Treaty would have to be changed significantly, including:

- Exclude fossil fuels from protection under the ECT
- Remove ISDS or other forms of investor state dispute settlement from the treaty
- Remove the sunset clause that allows investors to file claims for another 20 years after a state exits the ECT

We are aware of the ongoing modernisation process of the Energy Charter Treaty^{xvi} but have little hope that the above-mentioned objectives can be achieved. Firstly, the reform submissions of all parties, including the EU's, lack the required ambition and stay far behind the above-mentioned criteria. In other words, no one is demanding the necessary changes. Secondly, all changes to the ECT would require unanimity amongst members, which is extremely hard to achieve even for less contentious issues. Thirdly, it is even less likely given that several ECT members heavily rely on fossil fuels for their national revenues and will have little interest in changing anything.

We therefore call on all ECT member states to withdraw from the Energy Charter Treaty with immediate effect. Such a step was taken by Italy, which left the ECT in 2016. However, leaving alone does not make the ECT harmless, because it triggers a "sunset clause" that allows investors to make ECT claims for another 20 years – at least for investments that have been made up until then. This is deeply problematic. Therefore, we call on countries to take additional steps:

- Form a coalition of countries that agree to not allow ISDS claims from investors within the coalition against other coalition members. This coalition should adopt a joint instrument on withdrawal of consent to ISDS^{xvii} under the ECT, thereby setting a strong political signal that the ECT's current arbitration regime is unacceptable^{xviii}.



- Given the uncertainty about the legality of intra-EU ECT cases after the Achmea ruling of the European Court of Justice^{xix}, EU Member States should refuse to pay out any awards arising from intra-EU disputes. This would discourage some companies from entering into expensive arbitration cases.
- States must immediately publicise any threat they receive from a company to invoke the ECT, so that the public knows when the ECT is being used to put pressure on decision makers.
- States must urgently explore other legal and political solutions to “disarm” the ECT and its sunset clause.

2) Stop the expansion process

Many countries, particularly in Africa, Asia and South America, are in the process of joining the ECT^{xx}. This process must immediately be halted.

We call on all member states of the ECT in Europe to not allow any treaty accessions as long as the ECT is in its current state. They should stop any attempts by the Energy Charter Secretariat to get more governments to become a member and withdraw any support for promoting the ECT to new accession countries.

3) Stop signing further international or bilateral investment agreements that are similar in content to the ECT

While we start to see how toxic the ECT is becoming in hindering the clean energy transition, the EU is signing up to further bilateral investment agreements that contain investor-state arbitration similar to the one contained in the ECT. The European Commission refers to this new model of arbitration as “Investment Court System” (ICS). The ICS addresses some of the flaws of ISDS by improving the arbitration procedures. However, ICS like ISDS grants extensive rights to investors and would continue to allow them to attack climate policies. That’s why we call on the EU and all EU Member States to stop the negotiation or ratification of agreements that contain any form of investment arbitration, including the CETA agreement between the EU and Canada, the EU-Singapore Investment Agreement, the EU-Vietnam Investment Agreement and the investment agreement with China, that is still being negotiated.

(Date agreed: 6 December 2019)

ⁱ See Energy Charter (2019). [Updated statistics on Investment cases under the Energy Charter Treaty](#). October

ⁱⁱ Signatories of the Energy Charter Treaty in Europe include: The EU, all EU Member States (except Italy), Albania, Armenia, Azerbaijan, Belarus (did not ratify the Energy Charter Treaty, but applies it provisionally), Bosnia and Herzegovina, Euratom, Georgia, Iceland, Liechtenstein, Moldova, Montenegro, North Macedonia, Switzerland, Turkey and Ukraine.

ⁱⁱⁱ Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic (ICSID Case No. ARB/17/14). For more information on the case see: Friends of the Earth Europe and others (2019) [Dirty Oil Attacks on Action on Fossil Fuels: Rockhopper vs Italy](#).

-
- ^{iv} Friends of the Earth Europe and others (2019) [Blocking Climate Change Laws with ISDS Threats: Vermilion vs France](#), June.
- ^v Edwin van der Schoot (2019) [Claim om kolenverbod voor Staat](#), De Telegraaf, 5 September.
- ^{vi} CEO and TNI (2018). [One Treaty to Rule Them All](#), June. page 7.
- ^{vii} See [video presentation by Rockhopper CEO](#), starting at minute 19’.
- ^{viii} Gus van Harten (2016). [Arbitrator Behaviour in Asymmetrical Adjudication \(Part Two\): An Examination of Hypotheses of Bias in Investment Treaty Arbitration](#), January 25, Osgoode Legal Studies Research Paper No. 31/2016.
- ^{ix} AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary (II) (ICSID Case No. ARB/07/22); Electrabel S.A. v. The Republic of Hungary (ICSID Case No. ARB/07/19); EVN AG v. Republic of Bulgaria (ICSID Case No. ARB/13/17); ENERGO-PRO a.s. v. Republic of Bulgaria (ICSID Case No. ARB/15/19); ČEZ, a.s. v. Republic of Bulgaria (ICSID Case No. ARB/16/24)
- ^x ČEZ (Czech Republic) v. Albania.
- ^{xi} CEO and TNI (2018). [One Treaty to Rule Them All](#), June. page 46.
- ^{xii} Global Arbitration Review (2019). [Spain offers incentives to end renewables claims](#). 22 November.
- ^{xiii} ICSID Case No. ARB/13/36. [Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. vs. Kingdom of Spain. Award](#). 4 May 2017
- ^{xiv} ICSID Case No. ARB/13/36. [Eiser Infrastructure Limited and Energia Solar Luxembourg S.à r.l. vs. Kingdom of Spain. Award](#). 4 May 2017, page 136.
- ^{xv} In the ECT’s non-discrimination clause (art. 10(7)) states promise to accord investments of ECT member states treatment no less favourable than that accorded to investors of the host state or any third state. While no such lawsuits are known to date, this could lead to ECT claims against policy measures that deliberately distinguish between energy investments that advance climate change mitigation objectives and those that hinder their achievement. See: Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch (2019). [Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition](#), Transnational Dispute Management, February, 22.
- ^{xvi} Signatories of the ECT are currently debating a number of reforms, in particular of the ISDS mechanism entailed in the treaty. The negotiations for this “modernisation” will start in December 2019 with three negotiation rounds scheduled for 2020 and a review in December 2020. For a list of topics that are being discussed for reform, see Energy Charter (2018). [Approved topics for the modernisation of the Energy Charter Treaty](#). 29 November.
- ^{xvii} This policy option is described in some more detail in CCSI Policy Paper. [Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law](#). April 2018, page 8. A joint instrument could take the form of a declaration or opt-in agreement.
- ^{xviii} Such a declaration could be ignored by arbitration panels and they could continue to accept ISDS claims between coalition members. However, it would put the legitimacy of the system further into question and increase the pressure on other signatories of the ECT to reform the Treaty.
- ^{xix} In 2018, the European Court of Justice interpreted ISDS provisions contained in bilateral investment agreements between EU Member States as incompatible with EU law because it sidelines and undermines the powers of domestic courts ([See CIEL and ClientEarth report](#)). Since then, there has been a discussion whether this ruling also outlaws intra-EU ISDS cases on the basis of the ECT. This remains unresolved as of today.
- ^{xx} See CEO and TNI (2018). [One Treaty to Rule Them All](#), June, page 63ff.