

Youth hit by climate disasters sue European governments for protecting fossil fuels under the Energy Charter Treaty

Today, a group of young people affected by climate change-related events and whose life will be increasingly exposed to such events or other climate change impacts have decided to file a lawsuit before the European Court of Human Rights against key States: Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Luxembourg, Netherlands, Sweden, Switzerland and UK.

They ask the Court to declare that, to protect their rights under the Convention - which require States to limit their emissions in line with the Paris Agreement 1.5°C target and not to harm efforts in other States - the Respondent States must take necessary steps to remove the impediments created by the ECT

What is the Energy Charter Treaty?

- The [Energy Charter Treaty](#) (ECT) is a plurilateral investment agreement, with as of 2021 [52 signatory countries](#) and the EU. It was agreed in the 1990s and protects **foreign investments in the energy sector**.
- Under the ECT regime, foreign investors **can sue states** for almost any decisions that impact the investor's expected profits - including for climate protection.
- These claims are dealt with through a system of arbitration known as **investor-state dispute settlement (ISDS)**. ISDS sets up a parallel justice system of private arbitration tribunals, composed of party-appointed lawyers, circumventing national courts.
- The ECT already generated at least [150 investor-state arbitration claims](#), making it the [world's most litigated investment protection agreement](#)¹.

Why does the ECT matter?

- The [latest IPCC report](#) explicitly warns that the ECT and ISDS can have a chilling effect on climate policies.
- The ECT has already been used a number of times against states attempting to limit the production or use of fossil fuels (see overview below). It is [expected](#) that a lot more cases will arise in future as states take more ambitious steps to phase-out fossil fuels.
- There are several estimates of the value of fossil fuel infrastructure protected by the ECT regime. [A value of €345 billion](#) was given by Investigate Europe, for the EU, the UK and Switzerland alone (a figure which does not cover all investments in the coal sector). Another figure of €870 billion of stranded fossil fuels assets protected under the ECT regime, since its entry into force, was given by [Yamina Saheb](#).

¹ <https://corporateeurope.org/sites/default/files/2020-12/Busting%20the%20myths%20around%20the%20Energy%20Charter%20Treaty-medium.pdf>

- [61 coal-fired power plants](#) are currently protected by the ECT.

What is the modernisation process ?

- As early as 2009, contracting parties to the ECT agreed to modernise the treaty. In 2018, a list of [25 negotiation topics](#) was adopted as well as a decision to [commence negotiations](#) in December 2019. The EU adopted a [negotiation mandate for ECT reform in July 2019](#).
- With a seven month delay, the first negotiation round eventually took place in July 2020. Just one final round on the 23rd of June is planned before a plenary conference that will take place on the 24 aimed at reaching political agreement on the modernisation.

Why is it a failure?

- It has been argued that the ECT modernisation process is [doomed to failure](#) from the outset.
- The 53 ECT members include countries with dramatically different climate ambition, yet any changes to the ECT require **unanimity**. States such as Japan (the main contributor to the ECT) have already indicated that they do not support any major changes on the whole range of modernisation issues.
- **The level of ambition is too low. Fossil investments will remain protected in most of the ECT contracting states.** Even the changes proposed by the European Commission, would continue to protect existing fossil investments well into the 2030s and for some gas investments even until 2040. The risk of ECT lawsuits against climate action would continue to be high.
- **Compromises further weaken the prospect of climate compatibility.** To reach the necessary unanimity on proposals, a compromise package on contentious issues has been proposed. The so-called 'flexibility' option would allow states to unilaterally decide which investments are protected by the ECT. While the EU may seek to end slowly protections for fossil fuels, this option opens up the prospect that any other country could retain fossil fuel protection indefinitely.
- **Little progress** has been made so far and the EU has set a deadline for June 2022, by which time agreement must be reached on a package of reforms that meet their modernisation mandate. If this does not happen then they have threatened to withdraw from the Treaty. Just one day of negotiations remain and still there is no agreement on key issues such as which investments can be protected by the Treaty
- The ECT's **investment protection provisions have not been updated since the 1990s** and are now, according to the European Commission (EC) "outdated" compared to the new standards of the EU's reformed approach on investment policy. This topic was not even part of the modernisation discussion.

What is being said about the ECT by decision makers?

Pascal Canfin, RENEW MEP and chair of the ENVI in the European Parliament, **Anna Cavazzini**, Green MEP and chair of the Committee on the Internal Market and **Bernd Lange**, S&D MEP and chair of the Committee on International Trade, sent a letter on 2 May 2022 to the European Commission Executive Vice-President Valdis Dombrovskis Executive Vice-President Frans Timmermans and Commissioner Kadri Simson in which they call for the withdrawal of the ECT, they said: *“After 12 rounds of negotiations without substantive progress it is impossible to escape the conclusion that the ECT will not be adequately reformed and that the Commission will be unable to fulfill its mandate. It is time to prepare for a coordinated exit and an inter se agreement between the contracting parties that would jointly leave from the Energy Charter Treaty in order to mitigate the effect of the 20-year sunset clause.”*

Marie-Pierre Vedrenne, Renew MEP and Vice-Chair of the Committee on International Trade, during a European Parliament debate **said**: “We have to draw the conclusions of the fact that the negotiations have failed and we have to withdraw from the (ECT) Treaty.”

In February 2022, when the war on Ukraine started, **German environment minister Svenja Schulze** **warned about the Nord Stream 2 project**: *“We run the risk of ending up in international arbitration courts with compensation claims if we stop the project (Nord Stream 2).”*

Dan Jørgensen, Denmark’s climate and energy minister, said his government could be liable for paying “incredibly expensive” compensation to fossil fuel companies in [an article published in January 2022](#) .

Barbara Pompili, France’s Minister for Ecological Transition, told the [National Assembly on 22 June 2021](#): the treaty is “obsolete - it protects, among other things, investments in fossil fuels and is therefore no longer at all adapted to the energy and climate challenges of our time, following the Paris Agreement.” She reported that reform negotiations “are clearly not delivering” and “will not produce real progress for many years at best”.

The [Spanish government](#) also stated a similar view in a letter to the European executive.

French ministers have expressed their frustration at the lack of progress: In a [letter to the European Commission](#) in December 2020, they predict that modernisation will “probably not be completed for several years”. Also, they state, the EU’s goals are “far from being achieved”. France, therefore, suggested the desire to “publicly discuss” a “coordinated withdrawal” from the Energy Charter.

Firms using the ECT

The ECT is the agreement that has triggered the largest number of lawsuits by foreign investors against signatory states in the world. Recent cases include:

- Nord Stream 2 v. EU
 - Nord Stream 2 - as a Swiss registered company and a subsidiary of Gazprom - is [suing the EU](#) over the EU Gas Directive. It is possible that another [claim against Germany](#) will follow for holding the Nord Stream 2 licensing process.

- RWE v. Netherlands
 - Ten years ago, [RWE, a German energy company](#), decided to ignore climate science and build a brand new coal power station in the Netherlands. Last year, the Dutch government passed a law to stop burning coal by 2030. Using the ECT, RWE is demanding 1.4 billion euros in compensation for lost profits.
- Uniper v. Netherlands
 - Uniper, a German company is [asking for 1 billion euros](#) in compensation for the Dutch coal phase out by 2030.
- Ascent Resources v. Slovenia
 - Ascent Resources, a UK company [is claiming 120 million euros](#) after the Slovenian government asked for an environmental impact assessment before approving a gas fracking project. [It has recently announced](#) to also sue over the Slovenian fracking ban.
- Vermilion v. France:
 - In 2017 Canadian oil and gas company Vermilion threatened to sue France under the ECT over a proposed law to end fossil fuel extraction on French territory, including overseas, by 2040. The threat of a lawsuit potentially contributed to watering down the law, the final version of which allows exploitation permits to be renewed after that deadline.
- Rockhopper v. Italy:
 - Since 2017, the UK company Rockhopper has been suing Italy over a ban on new oil and gas operations near the country's coast, [claiming \\$275 million in compensation](#).

European wide mobilisation raises awareness of ECT dangers

- March 2022, [MEPs signal broad support for Energy Charter Treaty withdrawal](#) in ECT debate
- October 2021 **ETUC (European Trade Union Confederation)** adopted a new [position](#) on the Energy Charter Treaty stating that : "*ETUC believes that the scope of the negotiations does not answer some of the concerns highlighted above [Paris Agreement ; human rights ; international labour standards and corporate social responsibility] and that the mandate is too weak to resolve the different issues identified*". It called therefore for a "*termination of the treaty or collective withdrawal of EU countries combined with inter se agreement if negotiations to modernise the ECT are blocked*".
- September 2021, [Brussels stunt](#) demonstrating that modernisation is an obstacle course full of danger but exit would be a much simpler path.
- 6 July 2021: Over 400 civil society organisations joined the movement and published a [statement](#) to call EU leaders to pull out of the ECT by the end of 2021 at the COP26.
- In June 2021, 71 MEPs said "the time is up" in an [op-ed published in Euractiv](#).
- In February 2021, [an online petition](#) gathered over 1 million signatures asking the EU to pull out from the ECT.
- On 3 November 2020, [300 MEPs/MPs](#) from 20 EU member states called on EU countries to withdraw from the ECT if protection of foreign investment in fossil fuels is not removed from the Treaty.

- More than 400 climate leaders signed an [open letter](#) calling on EU governments to withdraw from the ECT.
- [Youth](#), the [European Renewable Energy Federation](#), and [investors](#) have also raised their voices against the ECT.

For more information, please contact:

Catherine Joppart, European Climate Foundation, catherine.joppart@europeanclimate.org