




Energy Charter Treaty (ECT) reform: Why it has failed to deliver on the EU's own objectives

Summary of key issues

What is the ECT? A trade and investment treaty which protects investments in the energy sector. Its provisions, effectively unchanged since conception in 1994, include the ability for fossil fuel investors to sue governments through private tribunals for multiple-billions of dollars if action on climate change and the environment damage their future profits.

What has the EU been trying to achieve in the reform? The EU and its Member States have long considered the ECT to be outdated, in conflict with basic principles of EU law, and a hindrance to climate ambition. In response they started a process to reform the Treaty in 2018. The EU set itself a **threefold objective for the reform**. This briefing summarises our analysis of progress towards those ambitions.

EU objective	On track?	Why?
Ensure the ECT is not an obstacle to fulfilment of the Paris Agreement or energy transition		At best, existing coal, gas and oil investments would continue to be protected well into the mid-2030s. Some new gas investments in pipelines and power stations could even be protected until 2040. And worst, other members of the ECT are reportedly able to protect fossil fuels indefinitely.
Reform the ECT's Investor-State Dispute Settlement system		The outdated system of ISDS in the ECT, declared 'dead' by Trade Commissioner Malmstrom in 2018, has not been reformed in the modernisation process. It hasn't even been one of the items tabled for discussion throughout the process. It is therefore politically unacceptable but also legally in contradiction with EU law, as it doesn't fulfil the conditions for arbitration set by the CJEU in the CETA ruling (Opinion 1/17).
Align investment protection with EU standards		Key elements of the EU's reform agenda are opposed by other ECT members. The EU's proposals are very likely to be watered down. As a result, investment protections will remain broad and retain supremacy over the legitimate right of states to regulate in the public interest. Crucially, it remains uncertain whether the reforms will ensure compatibility with EU law, as the ECT currently lacks sufficient safeguards to preserve the autonomy of EU courts.

Conclusions

All available information indicates that ECT reform is failing to deliver on the EU's own objectives. The ECT would continue to pose a **threat to climate action**, certain key provisions **(including ISDS)** would continue to be **in conflict with EU law** and would **undermine the EU's reformed approach to investment protection**. Some progress has been made on the issue of investment protection standards but in practice, these improvements will be insufficient to fulfil the EU's objective to safeguard states' right to regulate.

There can only be one conclusion. The ECT reform has not delivered what it needed to. The EU and several member states have stated before that in such a case, they would consider leaving the ECT. The time for the EU and its member states to decide on a joint **withdrawal from the ECT is now**. In order to **neutralise the sunset clause**, which allows investors to sue for another 20 years after a state has withdrawn, states should conclude an additional agreement to not apply this clause amongst one another.

Further reading

IISD (2021), *Investor–State Disputes in the Fossil Fuel Industry*

CAN Europe (2020), *Policy Briefing on the ECT*

Austrian Chamber of Labour (2022), *The Energy Charter Treaty: No significant advantages for Contracting Parties*

CEO/TNI (2018), *One Treaty to Rule them All*



For further information, please contact:

Cornelia Maarfield, Senior Trade and Investment Coordinator, CAN Europe
cornelia.maarfield@caneurope.org