

Secretive court system poses threat to Paris climate deal, says whistleblower

Treaty allows energy corporations to sue governments for billions over policies that could hurt their profits



The German utility Uniper, is reported to be seeking between €850m and €1bn for the early closure of its Maasvlakte coal-fired power plant near Rotterdam. Photograph: Heikki Saukkomaa/Rex/Shutterstock

Jennifer Rankin in Brussels

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A secretive investor court system poses a real threat to the **Paris climate agreement**, activists have said, as governments taking action to phase out fossil fuels face a slew of multimillion-dollar lawsuits for lost profits.

New data seen by the Guardian shows a surge in cases under the energy charter treaty (ECT), an obscure international agreement that allows energy corporations to sue governments over policies that could hurt their profits.

Coal and oil investors are **already suing governments** for several billions in compensation for lost profits over energy policy changes. For example, the German energy company RWE is suing the Netherlands for €1.4bn (£1.2bn)

over its plans to phase out coal, while Rockhopper Exploration, based in the UK, is suing the Italian government after it banned new drilling near the coast.

“It’s a real threat [to the Paris agreement]. It’s the biggest threat I am aware of,” said Yamina Saheb, a former employee of the ECT secretariat who quit in 2018 to raise the alarm.



Why activists fear little-known treaty could slow fossil fuel phase-out

“The Paris agreement ... means that we need to decarbonise in the current decade before 2030,” said Saheb, also a co-author of the Intergovernmental Panel on Climate Change’s report on mitigation. She has estimated that foreign investors could sue governments for €1.3tn until 2050 in compensation for early closure of coal, oil and gas plants – a sum that exceeds what the EU **hopes to spend on its green deal** in the next decade.

As compensation to companies is paid by public funds, governments would have less money to pay for new technology to make buildings, transport and industry greener. Saheb argued these payments could endanger the green transition. “It’s impossible to do everything,” she said.

Separate analysis of the treaty shared exclusively with the Guardian showed a 269% increase in cases in 2011-20 compared with the previous decade. “We are

going to see in future many more cases,” said Lucía Bárcena, of the Amsterdam-based Transnational Institute, who compiled the data. Since 2013, two-thirds of the cases have been brought against western European governments.

“The energy charter treaty ... has no cohesion at all with [EU] **climate policies**,” Bárcena said. “Trade and investment agreements are binding on states, which means if they break the contract then they have to pay huge amounts of money, while there is no other mechanism that binds countries to the goals that they are setting at **Cop26**. There is a big asymmetry.”

Representatives from the ECT’s 54 members are meeting next week for a ninth round of talks on modernising the treaty.

Signed in 1994, the treaty was intended to protect western companies investing in the oil- and gas-rich countries of the former Soviet Union. Only foreign investors, rather than domestic ones, can use the system, prompting longstanding complaints of privileged access. Campaigners now fear it could stymie the green transition.

“We obviously have to get out of the fossil field quite quickly and the energy charter treaty is in the way because it protects fossil fuels,” said Cornelia Maarfield, a senior trade and investment policy coordinator at the Climate Action Network Europe. “Our main concern is that once governments start taking decisions to phase out coal, gas and oil, they will run into difficulties with the investment protection chapter of this agreement.”

Germany’s RWE is suing the Netherlands for €1.4bn after the Dutch government decided to close all coal-fired power plants by 2030, including RWE’s Eemshaven plant, which began operating in 2015 with an expected life-span of 40 years. RWE said it supported the energy transition in the Netherlands, and “the only issue is therefore the fact that the coal ban law does not provide for adequate compensation”.

Another German utility, Uniper, is reported to be seeking between €850m and €1bn for the early closure of its Maasvlakte coal-fired power plant near Rotterdam, which opened in 2016. The company declined to confirm the damages it was seeking, saying: “Uniper is convinced that shutting down our power plant in Maasvlakte after only 15 years of operation would be unlawful without adequate compensation.”

The London-listed Rockhopper is suing Italy after MPs in 2016 reintroduced restrictions on drilling for oil and gas within 12 nautical miles of the coast. Rockhopper, which has never revealed the size of its claim, said in September it was suing for “very significant monetary damages on the basis of lost profits” after the Italian government rejected its oil exploration plans on the Ombrina Mare project in the Adriatic Sea.

Rockhopper said: “The Italian government issued licences and encouraged significant investment in oil and gas exploration based on this platform. Clearly it is not equitable to change the rules halfway through. It is also important to note that Italy continues to produce significant quantities of oil and gas within 12 miles of the coast.”

Investors are known to have filed 142 cases against governments since the ECT came into force in 1998. But these are only the known cases. Even the ECT’s Brussels-based secretariat acknowledges it does not have a complete picture, because investors are not obliged to reveal legal action under the ECT.

Urban Rusnák, the secretary general of the **Energy** Charter Secretariat, rejected the view that the treaty would hamper governments getting out of fossil fuels, saying it did not proscribe energy policy. “The treaty does not ban the governments [from stopping fossil fuels] There is nothing like automatic punishment.”

He suggested governments could quit fossil fuels without disputes under the ECT if they took a smart approach. “If the government is clever enough and they care about their investment climate, they can manage around,” he said.

Rusnák, who grew up in communist Czechoslovakia, stressed the importance of the ECT in upholding the rule of law. “Some recent requests of climate activists to ban all fossil fuels without any compensation are coming very close to what happened in Czechoslovakia ... when the regime in 1948 decided to expropriate all industries for a good reason of social justice,” he said. “My point here is not about individual cases. It’s about the system. Either we as a western civilisation really believe what we have agreed: we have to honour our agreements, and if conditions change we have to sit down and negotiate how we will get out of it.”

Neither did he agree with a proposal by NGOs that EU governments should quit the ECT en masse. “It is legally possible but the consequences are dire,” he said,

referring to a 20-year sunset clause that meant signatories remained bound for two decades. “Please be serious about the reform ... Otherwise you will be locked in a treaty that you don’t like for 20 years.”

Saheb argues the treaty is beyond reform because central Asian member states will veto any weakening of protection for fossil fuels. “The EU countries should withdraw altogether as one,” she said. “If we withdraw altogether we could agree to cancel this clause and then we could move on with our energy transition.”