

The European Union and its member states have recognised that the Energy Charter could block their way out of the fossil fuel era, given that it allows energy companies to sue states in arbitration courts for billions in compensation if countries enact climate legislation. But legal clauses and other signatories to the ECT might make it impossible to remove this obstacle in time to combat climate change.

The Energy Charter Treaty is a little-known investment protection treaty. All EU states signed it in the early 1990s. The treaty was once intended to protect corporations that invested in countries with uncertain legal situations, such as the former Soviet states of the 90s. But because the treaty's text is vaguely worded, energy investors can now use it to sue states for billions of euros of compensation if they enact laws to phase out coal, oil or gas in order to achieve their climate goals.

The British oil company Rockhopper is suing Italy for compensation of around €225 million before an international arbitration court because of a ban on oil production. The German energy company RWE is demanding €1.4 billion from the Netherlands because the state will ban coal burning from 2030. As a result, RWE will have to shut down a coal-fired power plant in the country.

In the past months, Investigate Europe spoke with many lawyers, scientists, activists and politicians. They warned that the Energy Charter's right to sue could lead to states postponing, weakening or abandoning their climate measures.

The EU and its member states have also recognised this. For years they have been trying to modernise the Energy Charter, but this process may never reach a conclusion. Therefore, some states are already calling for a withdrawal from the Energy Charter to be considered. However, one clause in the treaty prevents the possibility of an immediate and complete withdrawal.

Changes in the making

The reform of the Energy Charter Treaty started in November 2018, when the 55 Parties to the Charter voted to modernise it. No fewer than 25 topics were identified for discussion by a modernisation group. The EU states gave the Commission a mandate for the negotiations in July 2019. Almost a year later, in May 2020, the Commission presented its negotiating position. But it left one important point open: Which economic sectors should still be protected by the reformed Energy Charter Treaty?

In October last year, the Commission finally sent the member states a proposal for the future economic sectors. It suggests that existing coal, oil and gas investments be covered by the ECT for another 10 years, and that new investments in certain gas-fired power plants

be covered by the Treaty until 2040. Some member states initially protested. A document from the Council of the EU obtained by Investigate Europe shows that Austria and Luxembourg called for the protection of fossil infrastructure to end much earlier. Other states, such as Spain, asserted that only gas-fired power plants with very low CO2 emissions should continue to be covered by the Charter.

But there was also opposition from the other side of the spectrum. The governments of Malta, Cyprus, Croatia, Slovakia, the Czech Republic, Hungary, Greece, Romania, Lithuania and Poland openly opposed a more ambitious position in the Council. In the end, a compromise was reached, and it differed from the Commission's original proposal only in nuances: existing coal-fired power plants would be protected for another 10 years by a reformed Energy Charter Treaty, new gas-fired power plants until 2040.

Though the changes to the original position of the Commission were marginal, Luxembourg's Green Minister for the Environment, Claude Turmes, rejoiced immediately after the compromise was made: "After months of effort, I am pleased to have an EU proposal for the modernisation of the Energy Charter that is in line with the Paris Agreement," he announced.

However, Paul de Clerck, who is monitoring the member states' talks for the NGO, Friends of the Earth, is less optimistic in his assessment. "Nothing about this proposal is compatible with the Paris Agreement or the European Green Deal," he says. "With this modernisation, companies will be able to continue to use the Energy Charter to challenge climate action by states."

The path ahead

Even though Europe's states have agreed on a common line, it does not necessarily mean that the treaty will be modernised any time soon. The Energy Charter Treaty Modernisation Group has been meeting for a year. Last year, the group met four times. So far, it has dealt with very fundamental questions, such as who would have to pay lawyers' fees and court costs in the future. "It's incredibly technical," says a diplomat who participated in the negotiations, and who requested anonymity. "We have spent 16 days, six hours at a time on the talks." He estimates it will take at least two years before there an agreement emerges. The next round of negotiations is scheduled for early March.

It is highly questionable, then, whether there will be a new or revised treaty in two years that will protect the climate instead of endangering it. All parties will have to agree to the new version of the treaty, but the Japanese government already announced in 2019 that it believes "that it is not necessary to amend the current provisions of the ECT".

Several French ministers have expressed their frustration at the lack of progress. In a letter to the Commission, obtained by Investigate Europe, 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.

In early February, the Spanish government also made a similar threat in a letter. Should it not be possible to bring the Energy Charter Treaty into line with European climate goals, the government said, withdrawal would be the “only effective long-term solution”.

Late last year, almost 100 EU parliamentarians demanded in a letter to the Commission, the Council and the member states that leaving be considered. Members of Parliament are not allowed to have a say in the Charter negotiations — they only have the public to seek. The letter says that if the treaty is not modernised by the end of 2020, the EU will have to leave the Energy Charter. One of the signatories of the letter, Green MEP Anna Cavvazzini says, “Time is running out, we have to look for ways to exit sooner rather than later.”

Chair of the EU Parliament’s powerful Trade Committee Bernd Lange (SPD) said, “The EU must get out of the Energy Charter Treaty, because I don’t see that a sensible revision of its content is possible.” According to Lange, there is only one consequence and that is: to “denounce the Energy Charter Treaty”.

The EU Commission has long since realised that efforts at reform could fail. In an answer to a question from the EU Parliament, Trade Commissioner Valdis Dombrovskis writes, “If core EU objectives, including the alignment with the Paris Agreement, are not attained within a reasonable timeframe, the Commission may consider proposing other options, including the withdrawal from the ECT.”

But an immediate and complete withdrawal from the Treaty is not even possible, says legal scholar Markus Krajewski, who has been researching investment protection for many years. The reason is that the architects of the Energy Charter Treaty have made a provision for this. Article 47 of the treaty states that if a contracting party leaves the charter, it can be sued for another 20 years. Scientists call it the “sunset article”, activists refer to it as the “zombie clause”.

In recent years, it is EU investors who have sued EU states in two-thirds of all energy charter cases. An agreement between the member states would therefore solve a large part of the problem. But it is highly unlikely that this will happen. For years, a dispute has been smouldering over the compatibility of the treaty with EU law, with the EU states irreconcilably divided into two factions.

Last December, the Belgian government asked the European Court of Justice to clarify

whether the Energy Charter was compatible with EU law. Their ruling, which is still pending, could at least end the applicability of the Energy Charter Treaty for cases between EU investors and EU states. So the Energy Charter and the arbitration system that threatens the achievement of climate targets could eventually be brought down — by judges.

Source: investigate-europe.eu