

War on Want is a charity that campaigns against the root causes of poverty and human rights violations, as part of the worldwide movement for global justice. For more information on our work and evidence raised below, please contact Leah Sullivan, Senior Trade Campaigner.

This response answers the question “To what extent might the inclusion of Investor-State Dispute Settlement clauses in free trade agreements affect the UK’s climate change policies?”

1. One of the most urgent steps that the UK government can make to align trade with climate goals is to end its commitment to ISDS and remove ISDS from UK trade deals. ISDS should not be pursued in new trade agreements. The UK should exit the Energy Charter Treaty (ECT), which is fundamentally incompatible with ambitious action on climate.
2. The inclusion of Investor-State Dispute Settlement clauses in free trade agreements can affect the UK’s climate change policies in multiple ways.
 - a. By challenging, complicating and raising the costs of climate policy the UK may introduce;
 - b. By restricting the scope of what future UK governments can do to address the climate crisis and dissuading the UK government from adopting more ambitious climate policy;
 - c. By undermining public trust and confidence in the policy making processes around the defining social justice issue of our time – the climate crisis.
3. ISDS also has serious implications for the UK’s role in a sustainable and just climate globally. As long as the UK includes ISDS in trade deals, remains a member of the ECT and fails to remove ISDS from trade and investment agreements, UK companies can use ISDS to extract money from countries across the Global South transitioning to a low carbon economy, undermining a just transition.
4. On 27 February 2022, the IPCC delivered its starkest warnings yet. The impacts of the climate crisis are much worse than predicted. Floods, droughts, heatwaves will affect every region and warned that the world is not prepared for those impacts, and also that there is a limit to the earths ability to be able to adapt¹. Meanwhile, under current policies, the UK is not on track to achieve its climate targets². The UK is yet further away from taking a ‘fair share’ of responsibility for the climate crisis – to take its fair share of global effort the UK must reduce greenhouse gas emissions by a total of 200% below 1990 levels by 2030³.

¹ IPCC Sixth Assessment Report, Climate Change 2022: Impacts, Adaptation and Vulnerability, February 2022, <https://www.ipcc.ch/report/ar6/wg2/>

² <https://climateactiontracker.org/climate-target-update-tracker/united-kingdom/>

³ https://waronwant.org/sites/default/files/20-21_FairShareUK_Infographic_web.pdf

5. The International Energy Agency has made very clear that in any viable climate strategy “there is no need for investment in new fossil fuel supply”, and outlines as a key milestone for a viable pathway by 2021 that there should be no new oil and gas fields approved for development⁴. In spite of this the UK Government continues to consider the approval of new oil and gas exploration in the North Sea. Worryingly, BEIS has also said that they will “encourage continued healthy levels of investment” in the North Sea believing that ensuring that the UK “remains an attractive destination for global capital is the best way to secure an orderly and successful transition away from traditional fossil fuels⁵.”
6. If this or future UK governments decide to take measures to phase out fossil fuels by reversing decisions to issue licenses for additional North Sea oil and gas exploitation, UK taxpayers could find themselves faced with ISDS claims running into billions. Under the Energy Charter Treaty alone (the single most-used treaty for fossil fuel companies using ISDS), the UK has fossil fuel infrastructure worth more than €140 billion, the owners of which could sue the government under ISDS, according to [a recent study](#)⁶.
7. Climate measures that have been the subject of ISDS claims in recent years include where governments have taken the following actions;
 - a. Phasing out coal-powered energy generation in line with the Paris Agreement; Energy companies RWE and Uniper are taking claims of a combined €2.5 billion against the Netherlands over the Netherlands’ plans to phase out coal powered electricity generation by 2030⁷.
 - b. Rescinding permission for new pipelines after a change in government; Canadian TC Energy is making a USD \$15 billion claim against the US government over President Biden’s decision to cancel the Keystone XL Pipeline⁸.
 - c. Banning near shore oil and gas drilling amidst concerns over environment, earthquake risks, local fisheries, and tourism; Rockhopper is taking a \$350 million case against the government of Italy over Italy’s alleged breaches of the Energy Charter Treaty⁹.

⁴ *Net Zero by 2050 A Roadmap for the Global Energy Sector*, International Energy Agency, October 2021, https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroBy2050-ARoadmapfortheGlobalEnergySector_CORR.pdf

⁵ ENERGY WHITE PAPER, *Powering our Net Zero Future*, HM Government, December 2020 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/945899/201216_BEIS_EWP_Command_Paper_Accessible.pdf

⁶ Oliver Moldenhauer and Nico Schmidt *ECT data analysis: Results and Methods*, 23 February 2021, <https://www.investigate-europe.eu/en/2021/ect-data/>

⁷ RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands (ICSID Case No. ARB/21/4), Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands (ICSID Case No. ARB/21/22), <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/22>

⁸ <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/720/transcanada-v-usa>

⁹ <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/800/rockhopper-v-italy>

- d. Delaying a permit for a coal-fired power plant and requiring the corporation in question to take measures not to pollute a nearby river; In a US\$1.4 billion case taken by Vattenfall against Germany, the company claimed that these environmental requirements amounted to expropriation. The case resulted in the environmental protection requirements being dropped.
 - e. Banning fracking in response to overwhelming public opposition (Lone Pine v. Canada¹⁰)
 - f. Requiring an environmental impact assessment ahead of a planned fracking project; Ascent Resource is taking a €120 million arbitration suit under the ECT over Slovenia's decision to require over a legal requirement that an environmental assessment be carried out prior to a fracking project.
8. **These cases make clear that ISDS in UK trade deals will challenge, complicate and raise the costs of climate policies the UK may introduce.**
9. Raising the cost of climate action: Energy companies RWE and Uniper are taking claims of a combined €2.5 billion against the Netherlands over the Netherlands' plans to phase out coal powered electricity generation by 2030¹¹. This staggering claim came after both companies were operating loss-making plants¹², and had already been offered compensation sums in the hundreds of millions of euro¹³, preferring their odds under the ISDS system, in which projections of lost future profits are calculated in ways that are highly speculative and preferential to the investor. If the companies are successful, the compensation will come from the Dutch tax payer.
10. Germany is seeking to end coal-fired power generation by 2038. In negotiations with companies over the phase out, coal companies have used the threat of ISDS as leverage, agreeing only to waive their right to sue the country under the ECT if the German government massively increased the compensation package. The two biggest companies producing brown (lignite) coal have been given €4.35 billion in compensation. (Black, imported coal has a different phase-out mechanism). An estimate says that this sum is twelve times the amount they should be entitled to¹⁴. In deliberating over the decision, the German Ministry of Economics made reference to the threat of ISDS under the Energy Charter Treaty, noting the case that Uniper was threatening to bring against the Netherlands¹⁵.

¹⁰ <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/547/lone-pine-v-canada>

¹¹ RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands (ICSID Case No. ARB/21/4), Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands (ICSID Case No. ARB/21/22), <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/21/22>

¹² Bart-Jaap Verbeek, *Compensation for stranded assets?*, 28 April 2021, SOMO. "The plants are all expected to run at net annual losses from 2022 and will no longer be economically viable by 2024 at the latest." <https://www.somo.nl/compensation-for-stranded-assets/>

¹³ Ibid, Both RWE and Uniper declined to participate in a government proposal in September 2020 that would have resulted in €512 million compensation for RWE and €351 million for Uniper.

¹⁴ Fabian Flues, *Teuer erkauf: Wie der EnergiechartaVertrag die Kosten des deutschen Braunkohle ausstiegs in die Höhe trieb*, Powershift, November 2021, <https://power-shift.de/wp-content/uploads/2021/11/Wie-der-ECT-die-Kosten-des-deutschen-Braunkohleausstieg-in-die-Hoehe-trieb-web.pdf>

11. ISDS may already be affecting UK climate change policies through what is known as “regulatory chill” – where by the threat of ISDS claims pressurises governments into not taking a climate change measure for fear of running afoul of provisions in investment treaties that could spark ISDS claims that can run into the billions of pounds.
12. We may never know the true extent to which fears of ISDS claims influence policy making, given that calculations by governments in these policy spheres are often made behind closed doors. We nonetheless have strong indications of numerous instances whereby policy makers and governments have sought to introduce policy to reach climate goals only to find themselves forced to weaken, delay or backtrack on plans to introduce these climate policies over fear of ISDS claims.
13. In 2017 a draft law in France was to see the country become the first in the world to ban the extraction of oil and gas in its territory. A staggered phase out under then Minister Hulot’s Act would see the majority of extraction programs forced to shut down by 2030 and a total ban of oil and gas extraction by 2040, to comply with the Paris Agreement. Vermilion¹⁶, a Canadian oil and gas company responsible for 75% of oil and gas production in France, threatened to file an ISDS claim against the French state under the Energy Charter Treaty, stating that the Hulot Act would breach Vermillion’s “legitimate expectations” under the Treaty of a stable legal and commercial environment¹⁷. A few months later, Hulot had backed down, dropping the key demands of the initial law and enabling oil and gas extraction could now be renewed until at least 2040¹⁸. Hulot would resign from his position shortly afterwards, in frustration over the inability of the government to achieve progress, and over the power of industry lobbyists¹⁹. To date climate scientists say that France is not on track to meet even its “extremely weak” emissions reduction targets²⁰.
14. More recently, in 2022 Danish climate minister Dan Jorgensen told the media that fears of ISDS claims are hindering the countries climate ambitions. His ministry “is aware of examples of companies suing governments for fossil fuel phase-out laws and seeking compensation under the ECT”²¹ and has said that that the price tag on removing permissions for fossil fuel extraction earlier than 2050 “is one that no

¹⁵ Ibid, citing https://fragdenstaat.de/anfrage/dokumente-zum-energiecharta-vertrag-und-kohleausstieg/639279/anhang/211025-UIGBescheid-NAMEIIIFinal_geschwaerzt.pdf p.81

¹⁶ <https://www.vermillionenergy.com/>

¹⁷ Maxime Vaudano, *How the lobbies used the threat of ISDS to neuter the Hulot Act*, Le Monde, 4 September 2018, <https://www.bilaterals.org/?how-the-lobbies-used-the-threat-of&lang=en>

¹⁸ https://www.urgewald.org/sites/default/files/media-files/Investorenbriefing_EnergyCharterTreaty_Web.pdf

¹⁹ *French minister Nicolas Hulot resigns on live radio in frustration*, BBC, 28 August 2018, <https://www.bbc.co.uk/news/world-europe-45329573>

²⁰ Christian Holz; Tom Athanasiou; Sivan Kartha, *France's Climate Fair Share*, <https://zenodo.org/record/2595503#.YhwFcejP1PY>

²¹ Elizabeth Meager, *Cop26 targets pushed back under threat of being sued*, 14 January 2022, <https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/#:~:text=Countries%20party%20to%20the%20Energy,hindered%20their%20climate%20policy%20ambitions.>

government would be able to bear”²². Denmark, alongside the UK is one of the European countries most highly vulnerable to ISDS claims, due to the high value of assets in the country protected under the ECT. The UK has the highest amount of energy assets protected with ISDS under the Energy Charter Treaty at €140 billion, much of it through North Sea oil and gas, creating an “enormous potential” for lawsuits²³.

15. ISDS claims are also holding back multilateral climate efforts such as the Beyond Oil and Gas Alliance (BOGA), with some suggesting²⁴ that BOGA is lowering its collective ambition to avoid being sued using ISDS. New Zealand doesn’t want to take even this risk, however, with New Zealand Minister James Shaw stating that New Zealand couldn’t join the initiative for fear they would face investor ISDS claims²⁵.
16. **Secrecy around ISDS undermines public trust and accountability of decision makers in policy decisions around the defining social justice issue of our time – the climate crisis.** The climate crisis is at the forefront of public concern, thus it is deeply concerning that climate policy is being challenged, delayed, and reversed through a system of private arbitral tribunals that completely bypass the national judicial system, and the scrutiny of the public and MPs. ISDS cases are decided behind closed doors and the vast majority of cases filed have no publicly available documents. Decisions are made often by a very small panel (three) of arbitrators, and do not consider the obligations of a government to uphold human rights law or international environmental law, nor do they try to balance public and private interest.
17. **The inclusion of ISDS clauses in the UK’s trade and investment deals has serious consequences not only for UK climate policy but for global climate policy, and particularly the ability of developing countries to respond to the climate crisis.** The UK’s trade and investment deals have enabled UK-based companies to take at least 90 cases against other countries, many of those against developing countries. (The majority of ISDS cases are brought against developing countries²⁶). The findings of a recent study²⁷ on the chilling effect of international investment disputes suggest that the chilling effect on policy innovation is more strongly felt by developing countries.

²² Richard Orange, *The Danish climate minister closing down the oil industry for good*, 5 December 2020, <https://www.theguardian.com/world/2020/dec/05/the-danish-climate-minister-closing-down-the-oil-industry-for-good>

²³ Oliver Moldenhauer and Nico Schmidt *ECT data analysis: Results and Methods*, 23 February 2021, <https://www.investigate-europe.eu/en/2021/ect-data/>

²⁴ Elizabeth Meager, *Cop26 targets pushed back under threat of being sued*, 14 January 2022, <https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/#:~:text=Countries%20party%20to%20the%20Energy,hindered%20their%20climate%20policy%20ambitions.>

²⁵ Ibid

²⁶ <https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf>

²⁷ Moehlecke, Carolina (2019) *The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty*. *International Studies Quarterly*, doi: 10.1093/isq/sqz077 © The Author(s) (2019). Published by Oxford University Press on behalf of the International Studies Association

ISDS cases brought by fossil fuel companies over environmental protection and climate concerns could in particular prevent developing countries, often most severely impacted by the effects of climate change, and with fewer resources to implement climate adaptation measures, from taking action over climate and environmental protection measures that might impact the projected profits of UK companies.

18. The need for urgent change to address the climate crisis has never been clearer.

UK trade policy is failing to address the serious clash between the investment protection regime and the need to phase out the extraction and burning of fossil fuels as soon as possible. ISDS is delaying, stopping and reversing climate policies around the globe under the threat or reality of compensation claims from oil, coal and gas companies using ISDS. War on Want and tens of thousands of our supporters are urging the UK government to drop ISDS from our trade deals.