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The Energy Charter Treaty and the European Green Deal: A Critical Analysis Under EU and International Trade Law

Abstract

This article is based on the chapter of "Investment Protection Mechanism as an Impediment to the European Green Deal" in the author's master thesis titled "The European Green Deal: A Critical Analysis Under EU and International Trade Law".

While the European Green Deal objectives call for phasing out fossil fuel fired power plants with coal counting in the first place as the most carbon intensive fossil fuel, the investment protection mechanism set out in the Energy Charter Treaty emerges as an impediment to such phase-outs. This article explores how this investment protection mechanism relates to and hinders climate action targeted by the European Green Deal and what alternative solutions exist within this context.

1. Introduction

This article critically analyses of the European Green Deal[1] under the European Union ("EU") and international trade law by concentrating on fossil fuel phase-out with coal phase-out at the centre of it. Fossil fuel phase-out is an indispensable initiative to be adopted in order for the EU to reach the goal of net zero greenhouse gas ("GHG") emissions by 2050, which calls for the phase-out of coal in the first place that should be substantially realized

* The author's master thesis was submitted on 30 September 2021 within the master programme of European and International Business, Competition, and Regulatory Law at Freie Universität Berlin. The thesis, from which this article has been derived, reflected the latest status of the developments it touched upon as valid at the time of writing.

1 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Green Deal COM (2019) 640 final (hereinafter The European Green Deal)

https://doi.org/10.5771/9783957104205-157, am 07.06.2024, 15:47:19
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by 2030. Intending to terminate the operation of the power plants which have not yet come to the end of their lifetimes, fossil fuel phase-out plans encounter reaction and resistance by the investors whose investments lose their use and benefits due to such plans.

The article focuses on the Energy Charter Treaty ("ECT")[2] obligations with its related investment protection provisions, Investor-State Dispute Settlement ("ISDS") proceedings' nature and impact, the interaction of the EU and international law trade systems, and the EU's efforts to bring the conditions of the Energy Charter Treaty in line with the European Green Target goals. The analysis illustrates that the investment protection mechanism of the ECT may impede the reduction of GHG emissions by making states bear costly consequences and hesitate to regulate. The article concludes that the EU's efforts for the modernization of the ECT provisions are likely to fail to pay off in time, if they do at all, and argues that a coordinated withdrawal of the EU with its Member States from the ECT is a more effective and secure alternative solution, considerably reducing the risk of burdensome compensations and opening the way to the success of the European Green Deal.

2. An Introduction to the European Green Deal

When the European Green Deal[3] first came into existence as a 24-page communication[4] issued by the Commission, obviously it did not come out of the blue. The EU, its Member States[5], and their environmental policy within and outside the EU has taken an evolutionary – if not revolutionary – course of development since 1957, when the first signatures were put on the Treaty of Rome, bringing a European Economic Community ("EEC")[6] into existence with its six members[7] as the foundation of today's EU. Sticking to its affirmation "to step up the EU's efforts to ensure that current legislation and policies relevant to the Green Deal are enforced and effectively

2 The Energy Charter Treaty [1994] 2080 U.N.T.S. 95 (hereinafter ECT)

3 The European Green Deal may be referred to in various ways throughout this article, such as the EU Green Deal, the Green Deal, the Deal etc. All refer to the European Green Deal as cited in *supra* note 1.

4 The European Green Deal, *supra* note 1

5 Member States wherever written with capital initials refers to the Member States of the EU.

6 Treaty establishing the European Economic Community [1957]

7 The six members were Belgium, France, Italy, Luxembourg, West Germany and the Netherlands.

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implemented",[8] the Green Deal has given birth to the "European Climate Law" not later than 2 years after its announcement, where the targets to reduce GHG emissions by 55% by 2030 compared to 1990 levels and to achieve climate neutrality by 2050 are now enshrined.[9] This was followed by a new legislative proposal in July 2021 named the "Fit for 55 Package", in which the Commission presents the revisions required in all related policy instruments as well as the introduction of the new ones. For the purposes of pointing to the extent of the "Fit for 55 Package", one can count such main components as follows:[10] Amendment to Renewable Energy Directive to implement ambition of the new 2030 climate target, Revision of Energy Tax Directive, Revision of the EU Emission Trading System, Proposal for a Directive on Energy Efficiency, Revision of EU Emission Trading System for Aviation, Proposal for Amendment to Effort Sharing Regulation, Revision of the Market Stability Reserve, Social Climate Fund – and last but not the least – the Proposal for Regulation for Carbon Border Adjustment Mechanism. The Commission defines the package as a combination of various tools and applications which are "connected and complementary".[11]

3. Investment Protection Mechanism as an Impediment to the European Green Deal

In this chapter, the importance of fossil fuel phase-out – more specifically coal phase-out – in achieving the goals of the European Green Deal will be emphasized. This will be followed by a deep dive into the investment protection mechanism of the ECT and the characteristics manifesting themselves as an obstacle to a frictionless, cost and time-effective and efficient implementation of the Green Deal initiatives by the EU. The chapter will conclude with the implications of these obstacles on the success of the European Green Deal and the feasible solution alternatives before the EU to reduce the risk of liability for compensation of investor damages.

8 The European Green Deal, *supra* note 1, p.4

9 Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') (hereinafter European Climate Law)

10 See Fit for 55 Package proposal *available at* https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal/delivering-european-green-deal_en#documents

11 European Commission Press Release, European Green Deal: Commission proposes transformation of EU economy and society to meet climate ambitions (Brussels, 14 July 2021)

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3.1. Decarbonizing Energy Systems: Fossil Fuel Phase-Out

The European Green Deal, aiming at ensuring that "there are no net emissions of greenhouse gases in 2050 and economic growth is decoupled from resource use,"[12] calls for related initiatives and legislation that will achieve success "in the most effective and least burdensome way", while also ensuring that "all other EU initiatives live up to a green oath to 'do no harm'".[13] Therefore, the European Green Deal recognizes the significance of supporting sustainable investments in order to "direct financial and capital flows to green investment".[14]

Expectedly, the first focus area is the power generation sector, which together with both the production and use of energy "account for more than 75% of the EU's greenhouse gas emissions."[15] As the Commission acknowledges: "A power sector must be developed that is based largely on renewable sources, complemented by the rapid phasing out of coal and decarbonising gas."[16] Within this context, fossil fuel phase-out remains in the center of the agenda for the initiatives and instruments paving the way to the achievement of the European Green Deal.

3.2. Coal: What is Special About Coal-Fired Power Plants?

The energy power sector accounts for 40% of the total GHG emissions worldwide;[17] 72% of the power emissions stems from burning coal, which is the most carbon-intensive fossil fuel.[18] In the light of this, it is impossible to remain indifferent to the contribution of a global coal phase-out to the fight against climate change. According to the findings of an analysis based on "IPCC Special Report on 1.5°C",[19] it is estimated that "phase-out should be completed at the global level by a median date of 2037", the first regions

12 The European Green Deal, *supra* note 1, p.2
13 The European Green Deal, *supra* note 1, p.19
14 The European Green Deal, *supra* note 1, p.16
15 The European Green Deal, *supra* note 1, p.6
16 The European Green Deal, *supra* note 1, p.6
17 The International Energy Agency, *Global energy-related CO2 emissions by sector* (last updated 25 March 2021) *available at* https://www.iea.org/data-and-statistics/charts/global-energy-related-co2-emissions-by-sector, last accessed 27 September 2021
18 Climate Analytics Briefing, *Coal Phase-out – global and regional perspective*, *available at* https://climateanalytics.org/briefings/coal-phase-out/ last accessed 17 December 2021
19 IPCC stands for Intergovernmental Panel on Climate Change.

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that should phase out being OECD,[20] Eastern Europe and Former Soviet Union countries by 2031.[21] The same report underlines that "the operating coal plants would [if continued] exceed the Paris Agreement[22] benchmarks by four times in 2030 and more than twenty times by 2040, highlighting the huge risk of stranded assets that the coal sector will be facing in the next decades."[23]

This being the case, the "discrepancy between government plans for fossil fuel production and global production levels consistent with 1.5°C and 2°C pathways"[24] is quite alarming. There is an ultimate striking awareness stemming from the finding that "governments are planning to produce about 50% more fossil fuels by 2030 than would be consistent with a 2°C pathway and 120% more than would be consistent with a 1.5°C pathway", the largest production gap existing in the case of coal and all of this prevailing "due to minimal policy attention on curbing fossil fuel production".[25]

The EU stands out from the rest of the world with its ambitious caring for climate action. In the proposal for amendment to the Renewable Energy Directive, "fossil phase-out schemes with milestones"[26] is presented as a measure to be taken for the Member States to "collectively ensure that the share of energy from renewable sources in the Union's gross final consumption of energy in 2030 is at least 40%."[27] Within this context, while fossil fuel power plants are gradually phased out in the EU, the question arises of how to respond to investors in those plants, who invoke their investment protection rights for compensation of their stranded assets and lost profits.

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20 Yanguas Parra P. A. et. al., *Global and regional coal phase-out requirements of the Paris Agreement: Insights from the IPCC Special Report on 1.5°C*, Climate Analytics (September 2019) *available at* https://climateanalytics.org/media/report_coal_phase_out_2019.pdf

21 OECD stands for Organization for Economic Cooperation and Development. Further information *available at* https://www.oecd.org/about/members-and-partners/

22 Yanguas Parra P. A. et. al., *supra* note 20

23 The Paris Agreement [2015] I-54113

24 Production Gap, *The Production Gap: 2019 Report — Executive Summary*, p.2 *available at* http://productiongap.org/wp-content/uploads/2019/11/Production-Gap-Report-2019-Executive-Summary.pdf

25 Production Gap, *supra* note 23, p.3

26 Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 COM(2021) 557 final, para.12 (g)

27 European Commission, *supra* note 26, para. 2

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3.3. Investment Protection and Role of Investor-State Dispute Settlement

Most Bilateral Investment Treaties ("BITs"), especially the ones signed before the wave of change from 2010 onwards, have a very strictly worded – strict in the sense that they absolutely protect investors – "Compensation in case of expropriation" articles, as in the case of German Model BIT 2008, where the said article starts with the provision of "Investments by investors of either Contracting State shall enjoy full protection and security in the territory of the other Contracting State."[28] This "full protection and security" is detailed in the following paragraph from the same article:

> "Investments by investors of either Contracting State may not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except for the public benefit and against compensation. Such compensation must be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or other measure became publicly known. The compensation must be paid without delay and shall carry the usual bank interest until the time of payment; it must be effectively realizable and freely transferable (…)."[29]

According to this article, investors are definitely to be compensated immediately, irrespective of the reason for which their property has been expropriated by the host state, including where this is of public benefit. Regarding the calculation of the value of the expropriated investment, there are considerable risks due to the lack of transparency in the established rules for determination of the value for compensation both in the international investment agreements ("IIAs") texts and ISDS rulings. This means that "the choice of an appropriate valuation technique—and the various assumptions and adjustments made in the application of any given valuation technique—is left to the discretion of arbitral tribunals."[30]

Even this brief examination of an example article provides sufficient insight into the problems and bottlenecks before host states when an absolute investor protection and liability of host states for compensation established under IIAs are combined with the discretionary power of ISDS tribunals.

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28 German Model Treaty – 2008, *availa*ble at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download, Article 4(2)

29 German Model Treaty – 2008, *supra* note 28, Article 4(2)

30 Bonnitcha J., Brewin S., 'Compensation Under Investment Treaties' International Institute for Sustainable Development 16 (November 2020) *available at* https://www.iisd.org/system/files/publications/compensation-treaties-best-practicies-en.pdf

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ISDS mechanisms enable the investor to directly raise a dispute case against the host state. Going back to the example of the German Model BIT, the below wording proves how bound host states are by ISDS rulings:

> ”The award shall be binding and shall not be subject to any appeal or remedy other than those provided for in the Convention or arbitral rules on which the arbitral proceedings chosen by the investor are based. The award shall be enforced by the Contracting States as a final and absolute ruling under domestic law.”[31]

This illustrates that the liability for damages and amount of damages to be compensated rest absolutely with the arbitral tribunal's interpretation, discretion and decision, which is “a final and absolute ruling”. Therefore, ISDS mechanisms are the most hotly ‘disputed’ components of IIAs – recently even more so with an increased awareness throughout the world regarding the urgent need to take action for sustainability and climate change and adopt domestic regulations and law accordingly. The fact that arbitrators do not have to take into consideration rulings in preceding cases, that proceedings can be held in private and that awards concluded by arbitrators are not subject to any amendment by domestic courts could present a great motivation for investors to sue host states even where the reasons for doing so are not that clear.[32] Confirming in a way that the early developed dispute settlement mechanisms are dysfunctional and can even go so far as to limit the host state to the status quo by making it compensate the foreign investor only because it legitimately regulates, the OECD report provides some insight demonstrating that there is a diversion from “a relatively thinly defined procedural framework” to “very comprehensive rules on ISDS”. Thus it notes that the trend is so far followed by a few countries only, adding that “countries that have embarked early on an investment treaty programme have a number of treaties with provisions that would probably not be negotiated today.”[33]

With the fossil fuel phase-outs initiated in the EU Member States, there are already quite a lot of cases raised either under BITs or the ECT, where the damages that have been decided to be compensated by the Member

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31 German Model Treaty – 2008, *supra* note 28, Article 10(3)

32 Hallward-Driemeier, M.,‘Do bilateral investment treaties attract foreign direct investment? Only a bit - and they could bite’ World Bank Policy Research Working Paper Series. WPS 3121: 1–37 (2003) *available at* https://openknowledge.worldbank.org/handle/10986/18118

33 Pohl, J., K. et. al., ‘Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey’ OECD Working Papers on International Investment, 2012/02, OECD Publishing 44 (2012), *available at* https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf

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States correspond to billions of Euros, posing the risk of eating up most of the budget that would be needed for an EU-wide transition to a green economy. The following section further explores the challenges and dilemmas, relating to investment protection, that the EU has been facing on the path to the delivery of the European Green Deal.

3.4. Regulatory Chill: Dilemmas of the EU

In today's world there are 2,614 IIAs in force[34] and there are 1,104 publicly known ISDS cases[35] that have been so far dealt with. The findings of a case study show that "around 17% of the ISDS cases listed in the UNCTAD Investment Dispute Settlement Navigator as of January 2020 (at least 173 cases) stem from investments in or related to the fossil fuel sector", adding that 71 cases out of 173 resulted in the liability for the compensation of damages in favor of investors, among which some were "carbon majors".[36] What is striking is that "seven of the top ten largest awards in ISDS to date, all delivered since 2012, have involved fossil fuel companies or shareholders."[37] In order to give an idea of how costly these awards can be for a host state, the first three are well worth noting: *Hulley Enterprises v Russia* with 40 billion USD (2014), *ConocoPhillips v Venezuela* (2019) with almost 8,5 billion USD (2014), and *Veteran Petroleum v Russia* with 8,2 billion USD.[38] The same case study illustrates that within the dataset analyzed, there appear "257 coal power plants that are known to involve foreign investment and present a reasonable risk of asset stranding. The findings indicate that at least 75% of these plants are protected by at least one treaty with ISDS."[39]

These figures have been cited to demonstrate what climate-ambitious countries should be braced for. There are at least 192 more coal plants that are covered by ISDS mechanisms, out of which at least 51 with the risk of

34 UNCTAD, Investment Policy Hub, International Investment Agreements Navigator, *available at* https://investmentpolicy.unctad.org/international investment-agreements, last accessed 16 September 2021

35 UNCTAD, Investment Policy Hub, Investment Dispute Settlement Navigator, *available at* https://investmentpolicy.unctad.org/investment-dispute-settlement, last accessed 16 September 2021

36 Tienhaara K., Cotula L. 'Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets' International Institute for Environment and Development, IIED Land, Investment and Rights series 15 (2020) *available at* https://pubs.iied.org/sites/default/files/pdfs/migrate/17660IIED.pdf

37 Tienhaara K., Cotula L, *supra* note 36, p.16

38 Tienhaara K., Cotula L, *supra* note 36, p.16

39 Tienhaara K., Cotula L, *supra* note 36, p.48

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stranded asset are protected by the ECT,[40] altogether posing a risk of huge awards of billions for the host states planning a coal phase-out. In the era of the Paris Agreement, which requires the phase out of carbon-intensive fossil fuel use and production, it is clear that countries with a considerable number of coal-fired power plants planning a coal or fossil fuel phase out should be justifiably concerned. This is the point where the risk of 'regulatory chill' arises, that is, "governments will fail to regulate in the public interest in a timely and effective manner because of concerns about ISDS."[41] These concerns about ISDS that are in question have already been detailed in the previous section in combination with the gaps in the most BIT provisions. In short, while taking the legitimate, reasonable and necessary measures and relevant regulatory actions for the sake of fighting climate change, states are at the same time required to compensate investors with the billions awarded by the ISDS tribunal.

Within this context, there are hot debates as to whether those fossil fuel investments should be compensated when the host state takes measures in line with climate action;[42] "some have argued that the scale and pace of the necessary transition may call for businesses to be only partially compensated, if at all."[43] What is more, "even in the absence of legal proceedings, the explicit or implicit threat of recourse to ISDS can enhance the position of businesses in negotiations with states."[44] For the purposes of addressing the issue more concretely, some ISDS cases may be briefly cited. In the case of 2009 *Vattenfall v. Germany*, Vattenfall claimed compensation for damages amounting to 1,4 billion euros for the reason that the new "climate-protection requirements that were being imposed on the power plant would entail significant additional costs for the company" with "a significant loss in the value of the facility". [45] Vattenfall invoked the ECT for its compensation rights due to "indirect expropriation, breach of fair and equitable treatment/minimum standard of treatment, including denial of justice claims, full protection and security, or similar, arbitrary, unreasonable

40 Tienhaara K., Cotula L, *supra* note 36, p.3

41 Tienhaara K, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science', in C. Brown & K. Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011), pp. 606–28, at 615. *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065706

42 Tienhaara K., Cotula L, *supra* note 36, p.3

43 Tienhaara K., Cotula L, *supra* note 36, p.3

44 Tienhaara K., Cotula L, *supra* note 36, p.6

45 Knauer, S., *Power Plant Battle Goes to International Arbitration,* Spiegel (15.07.2009, 18.38 Uhr) https://www.spiegel.de/international/germany/vattenfall-vs-germany-power-plant-battle-goes-to-international-arbitration-a-636334.html

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and/or discriminatory measures."[46] This case was settled upon Germany's agreement to "water down the environmental standards".[47] The words of Michael Müller summarize the arguably shocking aspect of this situation: "It's really unprecedented how we are being pilloried just for implementing German and EU laws."[48]

A 'threat' case dating back to 2017 comes from France, which "softened its climate protection laws intended to restrict natural gas and oil production following a threat of legal action by Canadian company Vermilion".[49] Regulation only against compensation brings about the questions of state sovereignty as well[50], drawing attention to the fact that the state cannot freely regulate even for very legitimate reasons such as environmental protection and climate action, which puts the state in a severe dilemma of either regulating by bearing 'unbearable' costs, or not regulating at all and risking the non-achievement of climate goals, whose consequences will be even more 'unbearable'.

All these are only the beginning of an expected wave of many other ISDS cases that have been or will be raised by fossil fuel power plant investors in the EU in the face of the regulatory changes following the European Green Deal objectives. Now that the dilemma of regulatory chill for the EU has been clarified and emphasized as the region where a substantial number of coal plants are located,[51] the next section examines specific aspects arising from the protective application of the Energy Charter Treaty in this field.

3.5. Energy Charter Treaty: Energy Investments Safeguarded

Addressing that "German energy company RWE invoked an obscure agreement called the Energy Charter Treaty (ECT) to sue the Netherlands for 1,4

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46 *Vattenfall v. Germany (I)* (2009) ICSID Case No. ARB/09/6 *available at* https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/329/vattenfall-v-germany-i-

47 Corporate Europe Observatory, *Chapter 2: Investment treaty disputes: Big business for the arbitration industry* (27.11.2012) *available at* https://corporateeurope.org/en/2012/11/chapter-2-investment-treaty-disputes-big-business-arbitration-industry

48 Knauer, S., *supra* note 45

49 Schulz, F. *Global climate laws threatened by rise in investor-state disputes,* Euractiv (21. Okt. 2019, updated: 29. Okt. 2019) https://www.euractiv.com/section/economy-jobs/news/global-climate-laws-threatened-by-rise-in-investor-state-disputes/

50 Khachvani, D. 'Non-Compensable Regulation versus Regulatory Expropriation: Are Climate Change Regulations Compensable?' ICSID Review Foreign Investment Law Journal 1, 2 (2020)

51 Tienhaara K., Cotula L, *supra* note 36, p.28

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billion euros ($1.67 billion) as compensation for phasing out coal by 2030" and describing this as "the tip of a litigation iceberg" followed by another German energy company Uniper's going to ISDS under the ECT asking for a compensation of 1 billion euros,[52] Deutsche Welle headlined its news with "Multi-billion euro lawsuits derail climate action". The lines following the title are equally striking: "An archaic energy treaty is being weaponized by big emitters to sue EU governments who are phasing out fossil fuels. Hundreds of billions of taxpayer funds could be redirected from climate action to corporate coffers."[53] This encapsulates why the ECT has been one of the most notoriously popular international agreements of the last decade.

Although the main principles of the ECT do not deviate drastically from the protection and dispute settlement mechanisms of other IIAs as elaborated above, some characteristics of the ECT are still well-worth noting to base the further discussion on. The ECT's investment definition reads as "every kind of asset, owned or controlled directly or indirectly by an Investor",[54] which covers even the most climate-damaging ones, as is the case in almost all IIAs signed so far. In the case of the ECT this situation can be explained by its roots in history, which can be traced back to the objective of "integrating the energy sectors of the former Soviet Union and Eastern Europa into Western European markets at the end of the Cold War."[55]

Secondly, the ECT emphasizes the commitment to fair and equitable treatment "at all times", accompanied with "the most constant protection and security".[56] It is of no coincidence that statistics of ECT cases as of 3/8/2021[57] show that out of 79 publicly known cases, 24% were opened based on the alleged breach of fair and equitable treatment, making up for 36% together with the ones based on "the most constant protection and security." The ECT adds that "each Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and

52 Braun, S., *Multi-billion euro lawsuits derail climate action*, Deutsche Welle (19.04.2021) https://www.dw.com/en/energy-charter-treaty-ect-coal-fossil-fuels-climate-environment-uniper-rwe/a-57221166

53 Braun, S., *supra* note 52

54 ECT, *supra* note 2, Article 1(6)

55 Bernasconi-Osterwalder, N., *How the Energy Charter Treaty Could Have Costly Consequences for Governments and Climate Action*, International Institute for Sustainable Development (June 19, 2018) https://www.iisd.org/articles/how-energy-charter-treaty-could-have-costly-consequences-governments-and-climate-action

56 ECT, *supra* note 2, Article 10(1)

57 International Energy Charter, Statistics of ECT Cases as of 3/8/2021 *available at* https://www.energychartertreaty.org/cases/statistics/

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the enforcement of rights,"[58] stipulating that no domestic law is allowed to prohibit such assertion and enforcement. When it comes to compensation, the ECT refers to the "fair market value of the investment",[59] where both fairness and market value aspects are controversial, not being subject to any specific technique of calculation. Market value, as opposed to the book value of an investment, refers to the amount at which the company can be traded in the market, in which selling prices will largely depend on the future profits the investment will bring in its remaining lifetime.[60] These account for the awards of billions in the power sector so far under the ECT, the record having been registered in 2014 by the Yukos cases, namely *Yukos Universal Limited v. Russian Federation; Hulley Enterprises Limited v. Russian Federation; Veteran Petroleum Limited v. Russian Federation (18 July 2014)* with an award of 50 billion USD in favor of the claimant.[61]

As can be anticipated, the ECT has an "umbrella clause" too, which provides that "each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other contracting party".[62] According to an OECD working paper,[63] "…although there are some disparities, the ordinary meaning of 'shall observe' 'any commitments/obligations' seem to point towards an inclusive, wide interpretation which would cover all obligations assumed/entered into by the contracting States, including contracts, unless otherwise stated." This is why "investors frequently rely on umbrella clauses as a catch-all provision where the state's conduct may not constitute a breach of other treaty obligations."[64] To illustrate the point, the case *Al-Bahloul v. Tajikistan (2008)* was concluded with an award by the tribunal based on the rights given to the investor under this clause of the ECT upon the "claims arising out of the government's alleged failure to ensure the issuance of licenses pursuant to several hydrocarbon

58 ECT, *supra* note 2, Article 10(12)

59 ECT, *supra* note 2, Article 13(1)

60 See for further information: https://www.investopedia.com/terms/m/marketvalue.asp

61 International Energy Charter, Statistics of ECT Cases as of 3/8/2021 *available at* https://www.energychartertreaty.org/cases/statistics/

62 ECT, *supra* note 2, Article 10(1)

63 Yannaca-Small, K. 'Interpretation of the Umbrella Clause in Investment Agreements' OECD Working Papers on International Investment, 2006/03, OECD Publishing (2006) available at: https://www.oecd.org/daf/inv/investment-policy/WP-2006_3.pdf

64 Ortiz A. L., 'Investment arbitration under the Energy Charter Treaty' Practical Law Arbitration 4 (2015) *available at* https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2015/03/investment-arbitration-under-the-energy-charter-tr/files/artortizlennoninvarbunderenergychartertreaty/fileattachment/artortizlennoninvarbunderenergychartertreaty.pdf

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exploration agreements concluded between Mr. Al-Bahloul and Tajikistan's State Committee for Oil and Gas for four areas (Rengan, Sargazon, Yalgyzkak and East Soupetau) in Tajikistan."[65] In the final award the tribunal notes: "The obligation of Contracting Parties under the umbrella clause of Article 10(1) ECT to "*observe any obligations entered into*" implies the possibility for a tribunal in case of breach to order that Contracting Party comply with its obligations."[66]

Further complicating matters for ECT contracting states, a "survival clause" – or "sunset clause" as it may also be called – prevents them from escaping liability for compensation even after withdrawing from the treaty by stipulating: "The provisions of this Treaty shall continue to apply (…) as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date."[67] This is exactly why Italy, upon the effectiveness of its withdrawal from January 2016 onwards, has faced 7 more ISDS cases as respondent since then.[68]

The above may arguably justify the description of the ECT by one commentator as "the world's most dangerous investment treaty".[69] The next sections will explore further what impact and implications investment agreements, particularly the ECT, have on the success of the European Green Deal by touching on the recent and ongoing developments within the context of IIAs on the EU side as well of the ECT on the multilateral side.

65 *Al-Bahloul v. Tajikistan* (2008) SCC Case No. 064/2008 *available at* https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/325/al-bahloul-v-tajikistan

66 Final Award in the Matter of the Arbitration *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. 064/2008, para. 48 *available at* https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Cases/20_Al-Bahloul/Fin_Aw_Al-Bahloul_v._Tajikistan.pdf

67 ECT, *supra* note 2, Article 47(3)

68 UNCTAD, Italy Cases as Respondent State, available at https://investmentpolicy.unctad.org/investment-dispute-settlement/country/103/italy/respondent, last accessed on 17 September 2021

69 Eberhardt, P., Olivet C., 'Silent Expansion: Will the world's most dangerous investment treaty take the global south hostage?' Corporate Europe Observatory (April 2020) *available at* https://energy-charter-dirty-secrets.org/wp-content/uploads/2020/04/ECT-Silent-expansion.pdf

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3.6. Implications on the Success of the European Green Deal

3.6.1. Approaches to Intra-EU Investment Agreements and ISDS

The European Court of Justice ("ECJ") marked the end of ISDS proceedings in the intra-EU BITs through its judgement in the case *Achmea v Slovak Republic* on 6 March 2018, where it held that:

> "Articles 267 and 344 [of the Treaty on the Functioning of the European Union] must be interpreted as precluding a provision in an international agreement concluded between Member States, [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept"[70]

This brought about the signing of the "Agreement for the Termination of BITs Between the Member States of the EU" in May 2020, which did not only terminate the BITs in force, but also the application of any sunset clauses contained in these BITs as well as those in the already terminated ones.[71]

A question that may be rightly brought forward at this point is: "If this is the case, where do the current ISDS threats and cases come from in which both the claimant and respondent are the Member States of the EU?" The answer will not surprise: the ECT. What both the *Achmea* judgement and the agreement for termination of intra-EU BITs have in common is that they do not crystallize any ruling pertaining to the applicability of the ISDS clauses of the ECT between the EU Member States. The declaration[72] on the legal consequences of the A*chmea* judgment addresses the topic in an obscure way, by noting that according to the interpretation of the arbitral tribunals, the ISDS clauses of the ECT apply between the EU Member States, which would render the clause incompatible with the EU law. Furthermore, the communication on the protection of intra-EU investment notes: "This provision [Article 26 of the Energy Charter Treaty], if interpreted correctly,

70 *Achmea v Slovak Republic* ECJ Case C-284/16 (2018) para.60

71 Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union [2020] L 169/1 Article 2 (hereinafter Agreement for the termination of BITs)

72 Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, *available at* https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf

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does not provide for an investor-State arbitration clause applicable between investors from a Member States of the EU and another Member States of the EU."[73] The addressing of the issue in the agreement terminating the intra-EU BITs[74] begs even more attention: "(…) this Agreement addresses intra-EU bilateral investment treaties; it does not cover intra-EU proceedings on the basis of Article 26 of the Energy Charter Treaty. The European Union and its Member States will deal with this matter at a later stage."

This 'later stage' did come quite early. The EU had to deal with this issue pressingly amidst the increasing number of the ISDS cases in which the Member States invoke the ECT against each other within the context of the climate action policies. The recent examples are from the Netherlands whose coal phase-out plan has already been challenged by German companies RWE and Uniper;[75] Belgium already pushed towards the end of 2020 for "an opinion on the compatibility of the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty with the European Treaties".[76] The wish of Belgium, though partly – since it had asked the opinion on the modernized version,[77] not on the current one – has been materialized through the judgement of the ECJ in a very recent case in the beginning of September 2021, namely the case *République de Moldavie v Société Komstroy*, where the ECJ ruled regarding the dispute settlement mechanism of the ECT that "[…]preservation of the autonomy and of the particular nature of EU law precludes the same obligations under the ECT from being imposed on Member States as between themselves."[78]

While there are many questions that beg attention within this context, the question that will be focused on for further discussion is: Are there any possible outlets to avoid spending billions both as the costs and awards of arbitral proceedings, which will enable the channeling of these billions

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73 Communication from the Commission to the European Parliament and the Council on Protection of intra-EU investment COM(2018) 547 final (hereinafter Protection of intra-EU investment), p.3

74 Agreement for the termination of BITs, *supra* note 71, Preamble

75 Keating, D., *Dutch Lawmakers Under Pressure Over Coal Phase-Out*, Forbes (Dec 2, 2019,06:38am EST) https://www.forbes.com/sites/davekeating/2019/12/02/dutch-lawmakers-under-pressure-over-coal-phase-out/?sh=5ecccb754dc8

76 Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation, *Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty* (03 December 2020) *available at* https://diplomatie.belgium.be/en/newsroom/news/2020/belgium_requests_opinion_intra_european_application_arbitration_provisions

77 The EU's effort to modernize the ECT is dealt with under section 3.6.2. of this article.

78 *République de Moldavie* ECJ C-741/19 (2021) para.65

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into the climate action policy objectives of the EU as set out in the European Green Deal? The next section explores the efforts of the EU to have some clauses of the ECT amended in a 'modernized' way to make space for environmental and climate change policies of the European Green Deal without having to compensate companies. The options of withdrawal from or termination of the ECT as solution alternatives are also discussed.

3.6.2. Energy Charter Treaty: Re-Negotiation, Withdrawal or Termination?

Now that the recent developments in the climate change regulations which are primarily targeted at fossil fuel phase out – coal being in the first place – have already started to trigger what was initially feared, that is, the looming number of ISDS cases, the regulating contracting states are desperately seeking a solution to avoid being punished for doing their best to achieve the goals of the Paris Agreement, and more specifically for the EU, the goals of the European Green Deal.

A. Re-Negotiation

Within this context, there is a pressing question: "Is there any scope for states to prevent, or significantly reduce, the potential influx of energy-related investment arbitrations?"[79] The answer of the EU to this question seems to be: 'It is worth giving a try', which can be inferred from the EU's dedication to modernize the ECT to enable it to serve the purposes of today's concerns and circumstances rather than being only an instrument of a mere absolute investor and investment protection. The inception of the modernization idea dates back to 2009[80] and started to make systematic progress from November 2017 onwards, when it was confirmed and agreed by the Energy Charter Conference that the modernization discussions would be started.[81] One year after this, a further agreement took place regarding the list of topics subject to the modernization discussions of the ECT, among which are the definition of fair and equitable treatment, MFN clause, clarification

79 Vaaranmaa, O., 'The Energy Charter Treaty, Frivolous Claims and the Looming Threat of Investor-state Dispute Settlement: Any Hope from the EU's Modernisation Proposal?' Vol. 8 No. 2 (2021): International law: Open issue, Groningen Journal of International Law 272 (2021) *available at* https://ugp.rug.nl/GROJIL/article/view/37340

80 International Energy Charter, *The Energy Charter Treaty and the Modernisation of the Energy Charter Process,* (5 May 2011) https://www.energycharter.org/media/news/article/the-energy-charter-treaty-and-the-modernisation-of-the-energy-charter-process/

81 International Energy Charter, Modernisation of the Treaty, *available at* https://www.energychartertreaty.org/modernisation-of-the-treaty/, last accessed on 19 September 2021

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of "most constant protection and security", umbrella clause, compensation for losses, valuation of damages, frivolous claims, transparency – and most importantly – the right to regulate and sustainable development.[82] Notably, the list of the items agreed for modernization negotiations does not include ISDS and intra-EU dispute topics due to the refusal of Japan to have the ISDS in the list.[83]

The first round of negotiations was held on 6-9 July 2020, and the last one held so far is the sixth round on 6-9 July 2021.[84] The public communication[85] of the last round notes that "a high degree of convergence on the clarification of most constant protection and security, compensation for losses, the MFN clause and transfers related to investments was reached", adding that the introduction of treaty language preserving the "right to regulate" continued to be considered and definition of fair and equitable treatment was agreed to be subject to further detailed discussion.

When it comes to what the EU would like to change in the ECT, the most direct reference is the text proposal[86] submitted by the EU for the purposes of modernization. The EU states that "the key objectives of the Commission's proposal for the modernization of the ECT are to update the investment protection standards and to ensure that the ECT facilitates the EU's climate action and energy transition in line with the European Green Deal and the Paris Agreement."[87] The EU version of the ECT mainly proposes a new article titled "Regulatory Measures" giving the contracting states the right to regulate to "achieve legitimate policy objectives, such as the protection of the environment, including combatting climate change"; a definition of fair and equitable treatment with clarification of the meaning of "most constant protection and security" as the "obligations relating to ensure the physical security of investors and investments"; replacement

82 International Energy Charter, *supra* note 81

83 Miruplus, *Interview with Masami Nakata, Former Assistant Secretary General of the Energy Charter Treaty (ECT)* (17 Marc 2021) *available at* https://plus.iru-miru.com/en/article/40842

84 International Energy Charter, *supra* note 81

85 International Energy Charter, Public Communication on the Sixth Negotiation Round of the Modernization of the Energy Charter, *available at* https://www.energychartertreaty.org/fileadmin/user_upload/2021.07_ENG.pdf (hereinafter ECT Public Communication)

86 EU text proposal for the modernisation of the Energy Charter Treaty (ECT), *available at* https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf (hereinafter EU text proposal)

87 European Commission, *Energy Charter Treaty: substantial progress achieved in modernisation negotiations,* (12 July 2021) https://trade.ec.europa.eu/doclib/press/index.cfm?id=2286

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of the umbrella clause with a clear wording banning it;[88] a sustainable development chapter with climate change and clean energy transition responsibilities of the contracting states; and - last but not least, an insertion of "the rules of a multilateral investment court to which the Contracting Party which is party to the dispute is a Party" as one of the applicable dispute resolution mechanisms,[89] in relation to which the EU adds a note in the proposal inviting the contracting states to "consider this system as an alternative to the investor-state arbitration pursuant to Article 26 of the ECT".[90] The investment court system has been part of the recent investment agreements of the EU as a result of the reformed approach of the EU to investment, examples of which are the EU-Canada Comprehensive Economic and Trade Agreement, the EU-Singapore Investment Protection Agreement, the EU-Vietnam Investment Protection Agreement and the EU-Mexico Global Agreement.[91] Apparently, the EU is trying its best to place the ISDS mechanisms on the agenda of modernization discussions.

The implementation of an amendment in the text of the ECT requires unanimity as stipulated in Article 36 (1)(a)[92] and the opinions raised by some contracting states already hint at the great challenge before the EU as to the possibility of unanimity. Japan already aired its perspective back in 2019 noting that "it is not necessary to amend the current ECT provisions."[93] Even in the event of a unanimous agreement, what will matter in the end will be the agreed new wordings of the ECT. While the negotiations will continue with the next round coming up at the end of September 2021, the debates are ongoing as to how effective the EU's text proposal, even if accepted as it stands, will be for the EU's successful implementation of

88 The wording is: *"A breach of another provision of this Treaty, or of any other international agreement, does not constitute a breach of this paragraph."*

89 For Investment Court System description see Trade for all, *supra* note 70 p.21"*…Investment Court System composed of a Tribunal of first instance and an Appeal Tribunal operating like traditional courts. There will be a clear code of conduct to avoid conflicts of interest, independent judges with high technical and legal qualifications comparable to those required for the members of permanent international courts, such as the International Court of Justice and the WTO Appellate Body:"*

90 EU text proposal, supra note 86, p.15

91 Recommendation for a Council Decision authorising the entering into negotiations on the modernisation of the Energy Charter Treaty COM(2019) 231 final, p.2, footnote 5

92 ECT, *supra* note 2, Article 36(1)(a)

93 Energy Charter Secretariat, Decision of the Energy Charter Conference - Adoption by Correspondence – Policy Options for Modernisation of the ECT, CCDEC 2019 p.3, *available at* https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf

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the European Green Deal instruments and the achievement of the Paris Agreement goals. The EU's text proposal stipulates to cease the application of investment protection clauses (Part III: Investment Promotion and Protection of the ECT) to investments made before the amendment relating to fossil products and materials and electricity produced from those ten years after the amendment takes effect but not later than 31 December 2040.[94] As for any investment relating to the same after the entry into force of the amendment, they will not be protected,[95] which aims at deterring the promotion of new investments in fossil fuels. However, new investments in gas pipelines made after the amendment has entered into force will be under protection for ten years after the amendment, but not later than 31 December 2040, if they are "able to transport safe and sustainable renewable and low-carbon gases, including hydrogen",[96] which can be explained by the need for such low carbon fuels in the phase of transition to the fully clean energy with security of supply. The reason the EU has stretched the duration of possibility of protection for existing fossil fuel investments for as long as 2040 could be a sign that the EU anyway hopes to reach an agreement on its modernized text in a few years or sooner and given the ten-year period of protection after the entry into force of the amended ECT, the fossil fuel protection under the ECT will be gone around the beginning of 2030s. If this is the case, it is difficult to justify such a hopeful stance. Even if the hope materializes, that will mean allowing "foreign investors of these coal power plants based in any ECT contracting state to continue to sue ECT host states for a decision to phase out coal for well over a decade."[97]

B. Withdrawal

At this point, in addition to the questions of the possibility of unanimity and well-functioning of the future modernized ECT provisions for the purposes of climate action, there is another significantly crucial question to

94 EU additional submission to its text proposal for the modernisation of the Energy Charter Treaty, available at https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159436.pdf "*This document is the European Union's (EU) additional submission to its text proposal for the modernisation of the Energy Charter Treaty (ECT), sent to the ECT Secretariat on 19 May 2020*" (hereinafter Additional text proposal)

95 Additional text proposal, *supra* note 94, p.2

96 Additional text proposal, *supra* note 94, p.2

97 Schaugg, L., Di Salvatore, L., *Reform or withdrawal from the ECT: What does it mean for coal?* International Institute for Sustainable Development Investment Treaty News (September 24, 2021) https://www.iisd.org/itn/en/2021/09/24/reform-or-withdrawal-from-the-ect-what-does-it-mean-for-coal/

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be asked: When and how much time? It has already been one year since the first negotiation round of the summer 2020. As understood from the developments in the last round,[98] the right to regulate and fair and equitable treatment clauses are yet to be further considered and discussed, which means that two of the most important clauses have not yet been agreed upon. The developments and progress recorded so far do not promise an effective conclusion of the negotiations in the near future, nor a conclusion of a text in the way EU is pushing for. The carbon budget of the atmosphere to limit the temperature increase below 1.5°C threshold does not justify the durations mentioned in the EU's modernized text proposal as pointed to above. The unfortunate truth is that "with emissions at a constant level, the budget would be expected to be used up in less than eight years from now."[99] This being the case, "rapidly reducing coal-based power generation down to 80% below 2010 levels by 2030, and a global phase-out by 2040 at the latest is the single most important step to keep the door open for achieving the Paris Agreement."[100]

In light of all the developments in the sphere of ECT modernization negotiations as given above, it can obviously be concluded that the EU needs to consider other possible solutions to prevent staying stuck in the middle of an avalanche of ISDS cases and threats with huge amounts at stake. At this point, the potential withdrawal from and termination of the ECT come to the fore as possible solution alternatives.

In the scenario of withdrawal, the EU and its Member States, which are all signatories to the ECT except Italy which withdrew earlier, may decide to withdraw altogether.[101] For such coordinated withdrawal to make sense, the survival clause stipulating obligation for compensation for the following 20 years after withdrawal[102] should be banned from applying further. The EU Member States may agree not to apply this clause to the intra-EU cases – by analogy to the termination of intra-EU BITs after the *Achmea* judgement – and remain subject only to the claims coming from non-EU parties under the ECT. This scenario is promising given that "intra-EU disputes account

98 ECT Public Communication, *supra* note 85

99 Mercator Research Institute on Global Commons and Climate Change, *Remaining Carbon Budget: That's how fast the carbon clock is ticking*, https://www.mcc-berlin.net/en/research/co2-budget.html

100 See Yanguas Parra P. A. et. al., *supra* note 20, Climate Analytics

101 France and Spain already proposed withdrawal from the ECT. See *Judgment by the European Court of Justice delivers significant blow to Energy Charter Treaty available at* https://www.epsu.org/article/judgment-european-court-justice-delivers-significant-blow-energy-charter-treaty

102 ECT, *supra* note 2, Article 47(3)

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for 80 of the 135 ECT-based cases initiated to date", which means "the possibility of an EU withdrawal combined with an *inter se* agreement neutralizing the survival clause could substantially reduce the risks posed by ECT-based arbitration to climate action."[103] According to a recent analysis, from among the "coal power plants that are currently generating an ISDS risk under the ECT", 45 are in the EU and owned by EU investors, while only 5 are in the EU but owned by foreign investors from states outside the EU that are contracting parties to the ECT.[104]It follows that a coordinated EU withdrawal, eliminating the litigation risk from investors of 45 coal plants and leaving the EU subject to the risk of ISDS claims from a minimal number of non-EU investors, could be an effective approach, reducing the risk of huge number and amounts of ISDS claims and threats against the coal phase out plants in the EU.

C. Termination

As for the scenario of termination, there is no specific provision on termination in the ECT, which makes Article 54(b)[105] of Vienna Convention on the Law of Treaties applicable as providing the conditions to terminate.[106] This stipulates that a termination can take place "at any time by consent of all the parties after consultation with the other contracting States". This option does not sound an easy one to materialize. Japan does not even support modernization, being satisfied with the current ECT in effect today. Furthermore, in case of a unanimous consent to terminate, this termination has to also mean the termination of application of the survival clause by eliminating all its effect and impact from the date of the termination. At a time when it is that difficult to agree on modernized provisions in favor of climate action, it would likely be quite impossible to agree on such termination.

To sum up, the modernization of the ECT involves a lot of complexities and has low chances of success when the requirements for unanimity and the time it takes to conclude the negotiations are considered, as well as the risks that the amendment will not be concluded in the way the EU proposes and will not help securing achievement of the Paris Agreement and Euro-

103 Brauch, M. D., *Should the European Union Fix, Leave or Kill the Energy Charter Treaty?*, Columbia Center on Sustainable Investment (February 09, 2021) *available at* https://ccsi.columbia.edu/news/should-european-union-fix-leave-or-kill-energy-charter-treaty

104 See Schaugg, L., Di Salvatore, *supra* note 97

105 Article 54(b) of Vienna Convention on the Law of Treaties [1969] U.N.T.S. vol. 1155, p. 331

106 See Brauch, M. D., *supra* note 103

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pean Green deal objectives (even if concluded with the text proposed by the EU). Therefore, the EU should think and decide carefully, considering the time and effort it has taken until now to progress into the conclusion of an amendment. This decision of the EU relates to a choice of continuing with the ECT modernization efforts at all costs or withdrawing as early as possible with all its Member States and concluding an intra-EU agreement terminating the application of the survival clause.

3.6.3. The European Green Deal Challenged

It is undeniably obvious that there is not much time to wait and waste when it comes to taking effective and ambitious climate action. A fossil fuel phase-out is indispensable for the attainment of the European Green Deal objectives, coal being in the first row of such phase-out. The EU Member States have already started to experience a wave of claims by the investors invoking the ECT for the compensation of their coal plant investments. Most of these ISDS cases are being raised by investors in one Member State against decisions taken by another. These compensations are a huge burden on the budget of the EU and Member States, which need those billions of Euros actually for green transition purposes. Having faced the reality of the outdated investment protection provisions which prevent regulation for legitimate climate purposes by making it unbearably costly, the EU has taken an active part in the negotiations for modernization of the ECT provisions by presenting its modernized text proposal. However, the chances of an early enough unanimous agreement by all the ECT contracting states on the EU proposal are quite low, endangering timely actions crucial both for the Green Deal and Paris Agreement targets. The most time and cost-effective solution alternative for the EU is a coordinated withdrawal with all its Member States, which should be followed by an *inter se* agreement between the EU Member States terminating the application of the survival clause of the ECT for the investments owned by the EU investors within the EU. This will reduce the risk of burdensome compensations to a most substantial extent as the coal power plant investments owned by non-EU investors within the EU that are covered by the ECT makes up only a few of the total coal investments in the EU covered by the ECT.

While there is a quite effective alternative outlet for the EU to avoid having to pay huge amounts due to the international investment protection mechanisms in place today, it is important that the EU chooses between staying in the modernization negotiations and withdrawal as early as possible not to be too late to achieve a substantial coal-phase out within the EU by 2030. There are still chances for the EU to meet the European Green

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Deal targets, however all these political, legal, regulatory, financial, technical frictions and complexities that have to be managed within the context of protected investments may slow down the pace of the EU on the road.

4. Conclusion

This article has analysed the fossil fuel phase-out with coal phase-out in the forefront as an initiative of the European Green Deal being challenged and threatened by the investment protection mechanism under the ECT. The hurdles before such phase-out plans of states stemming from the investment protection mechanisms making host states pay billions as a consequence of regulating for legitimate climate objectives have been highlighted. Elaborating on the looming risk of huge amount of compensations with billions at stake due to the ISDS cases raised or threatened to be raised, the article has focused on the solution alternatives to eliminate these hurdles: modernization of the ECT provisions, a coordinated EU withdrawal from the ECT, and termination of the ECT.

The article concludes that the modernization of the ECT does not offer promisingly effective results for timely climate action considering the unanimity requirement as well as the timeline described in the EU's text proposal for fossil fuel investment protection, and argues that while the pace of the EU on the implementation of the Green Deal initiatives may be slowed down by the increasing litigation cases and challenging modernization efforts, a coordinated EU withdrawal with the cancellation of the survival clause of the ECT between the Member States is a solution alternative which provides the EU with a huge step forward in the path to the achievement of the European Green Deal goals.

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