Modernisation of the **Energy Charter Treaty**

A Global Tragedy at a High Cost for Taxpayers

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The ECT failed in delivering in its policy objectives

- The Energy Charter Treaty (ECT) is a multilateral agreement, which protects foreign investments in energy supply through binding provisions.
- By January 2020, the ECT has been ratified by 53 countries and the European Union/Euratom.
- Original objectives of the ECT include:
  - Overcoming the political divisions between Western and Eastern Countries through a European Energy Market and an East/West energy forum.
  - Contributing to energy security of Western European countries through a continuous supply of fossil fuels from the East.
  - Overcoming the economic divisions by ensuring a flow of Western investment in the energy sector in the East through binding investment protection.

The ECT "*raison d'être*" became obsolete in 2009 with the withdrawal of Russia from its provisional application

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EU partnerships in the energy sector

World Trade Organization (WTO)

166 countries

Energy Charter Treaty (ECT)
53 countries + EU/EURATOM

EU Partnerships and Treaties in the Energy Sector

EU Economic Area (EEA)
EU28, Norway, Iceland, Liechtenstein

Energy Community (EnC)
EU28, Albania, Georgia, North Macedonia, Moldova, Montenegro, Ukraine | Bosnia and Herzegovina | Kosovo, Serbia

Eastern Partnership
EU28, Armenia, Georgia, Moldova, Ukraine | Azerbaijan, Belarus

Central-Asian Partnership
EU28, Kazakhstan, Kyrgyz Rep, Tajikistan | Uzbekistan, Turkmenistan

Bilateral Investment Treaties (BITs)
EU28, Japan, Switzerland, Turkey

Afghanistan, Australia, Jordan, Mongolia, Yemen

*Russian Federation, Italy**
** Russian Federation's withdrawal date : 2009*
Italy's withdrawal date : 20015

The ECT overlaps with all the partnerships and treaties targeting the energy sector and adopted since the entry into force of the Treaty

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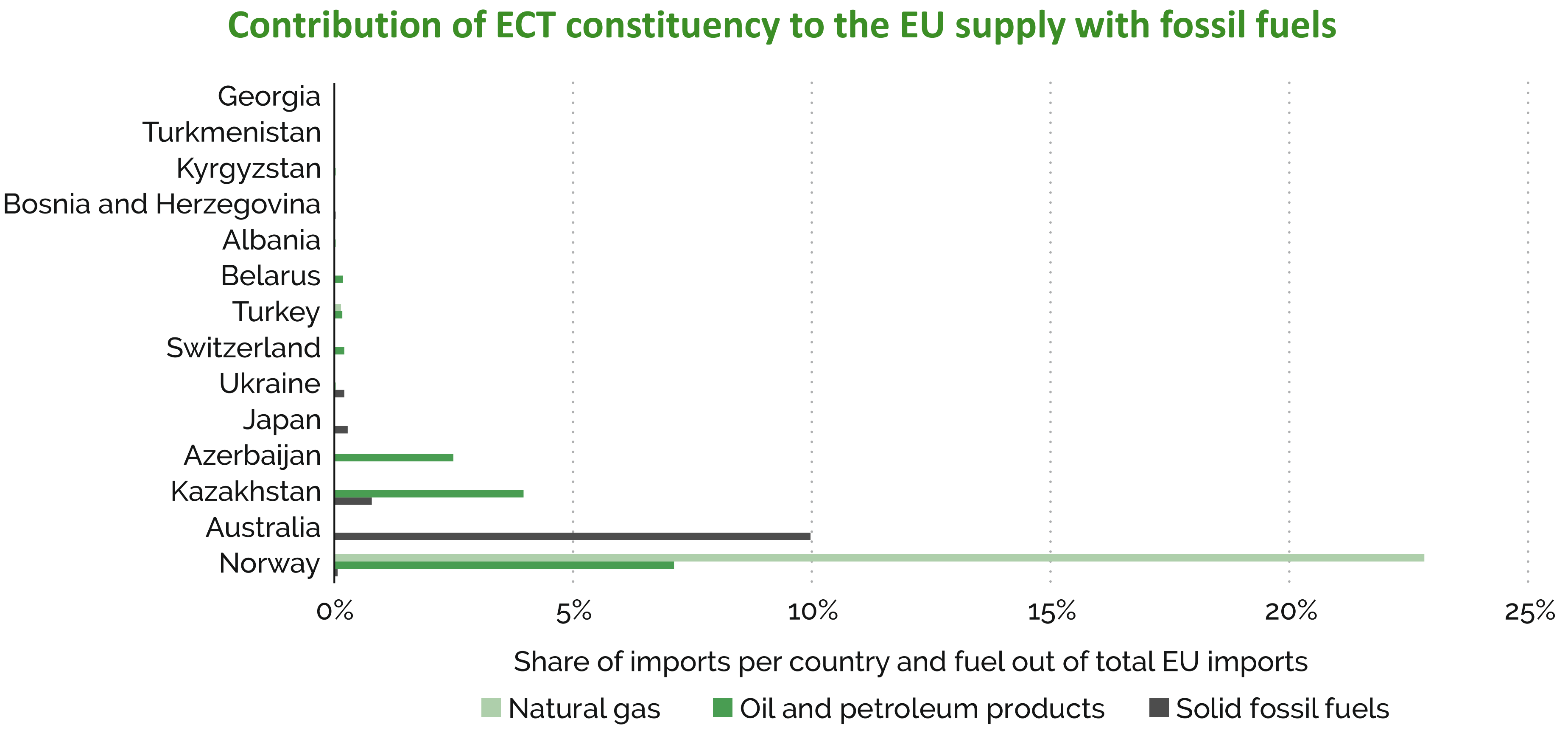
The contribution of ECT constituency to energy security in the EU is rather limited since the withdrawal of Russia



Norway is the main ECT signatory contributing to Europe's supply of oil and gas while Australia is the main ECT signatory contributing to Europe's supply with coal

The ECT failed in ensuring the flow of energy investment in Eastern countries

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Share of FDIs per NACE economic activities and country groupings

NACE economic activities in the energy sector	Intra-ECT out of total FDIs	Intra-EU	EFTA in EU	Other ECT in EU/ EFTA	EU/EFTA in EFTA	EU/EFTA in other ECT	non-EU/ EFTA in other ECT
		Out of Intra-ECT FDIs					
05 Mining of coal and lignite	87%	56%	0%	0%	0%	42%	2%
06(1) Extraction of crude petroleum	64%	55%	11%	16%	13%	2%	4%
06(2) Extraction of natural gas	55%	45%	16%	12%	19%	3%	5%
09(1) Support activities for petroleum and natural gas extraction	75%	58%	18%	5%	12%	0%	7%
19(1) Manufacture of coke oven products	6%	4%	0%	0%	0%	95%	1%
19(2) Manufacture of refined petroleum products	51%	60%	0%	4%	13%	23%	0%
35(11) Production of electricity	60%	87%	1%	7%	2%	2%	0%
35(12-13-14) Distribution, Transmission and Trade of electricity	69%	83%	0%	14%	1%	2%	0%
35(22-23) Distribution and Trade of gas	53%	83%	1%	10%	0%	3%	3%

The flow of FDIs in the energy sector is more likely driven by national energy/ investment policies and other country-level factors, such as those in the EU, rather than by the ECT

The ECT binding provisions protect foreign investments in energy supply only (coal, oil, gas, nuclear and electricity)

ECT provisions

- **Energy Charter Treaty**
  - **Binding provisions**
    - **Investment protection** through, the umbrella clause, fair and equitable treatment for foreign investments and most favoured nation treatment (Aticle 10), compensation for losses (Article 12) and against expropriation (Article 13)
    - **Free trade** in energy materials, products and energy related equipment based on WTO rules (Articles, 4, 5, 6 and 29)
    - **Freedom of transit** of energy materials and products without disctinction of origin, destination/ownership (Article 7)
    - **Mechanism for dispute resolution** of
      I) state to state disputes (Article 4)
      II) investor to state disputes (Article 26) and
      III) transit disputes (Article 32)
  - **Non-binding provisions**
    - **Environmental protection** by improving energy efficiency and developing renewable energies and clean technologies that reduce pollution accurring with the energy cycle (Article 19)
    - **Promotion of energy efficiency** as a considerable source of energy via the Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA)

Provisions on environmental protection and energy demand reduction are not binding under the ECT regime

In more than 20 years of existence, the ECT became a major threat to public finance and government’s right to regulate

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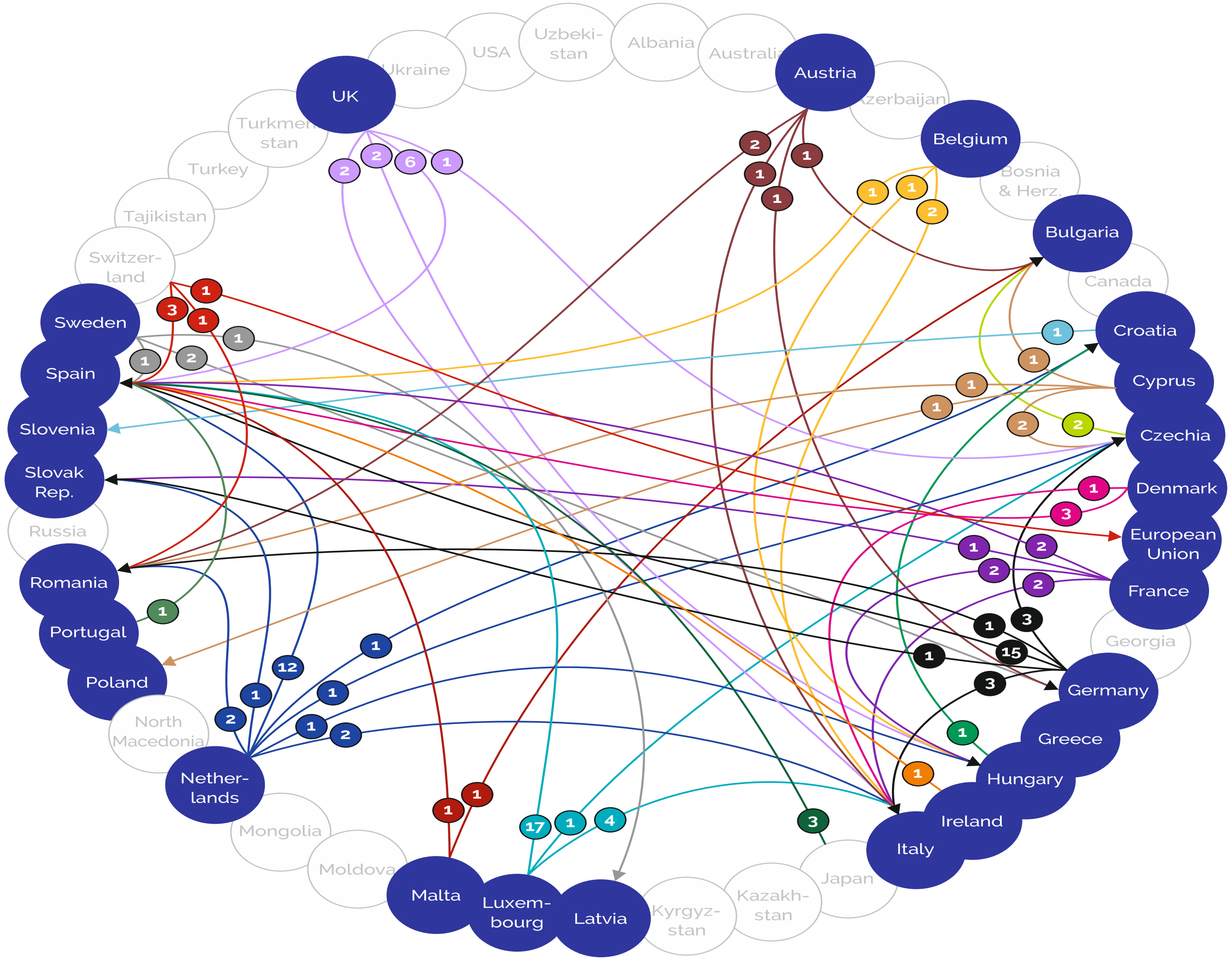
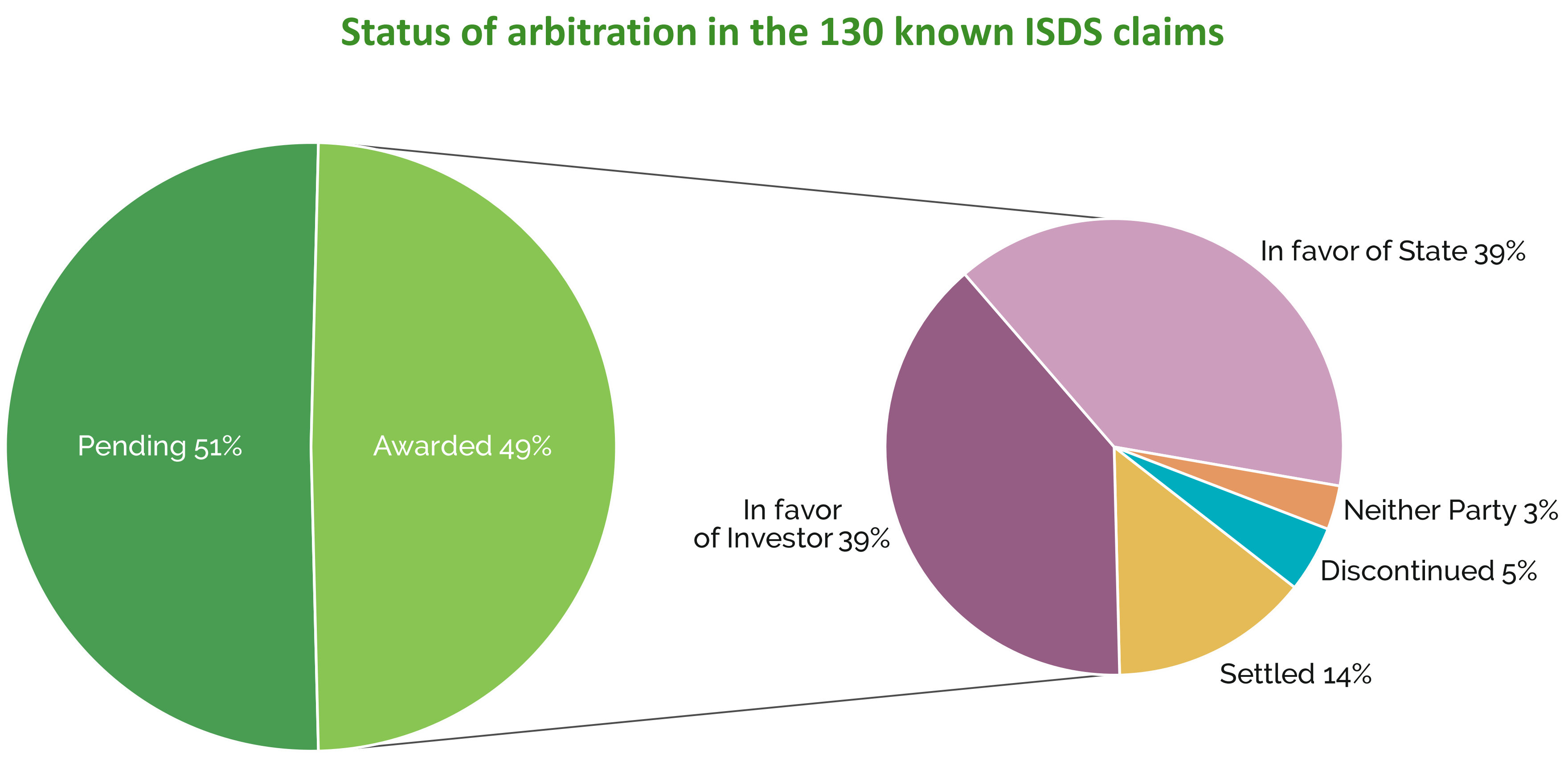
Respondent States and host States of the 88 ISDS claims against the EU and its MSs



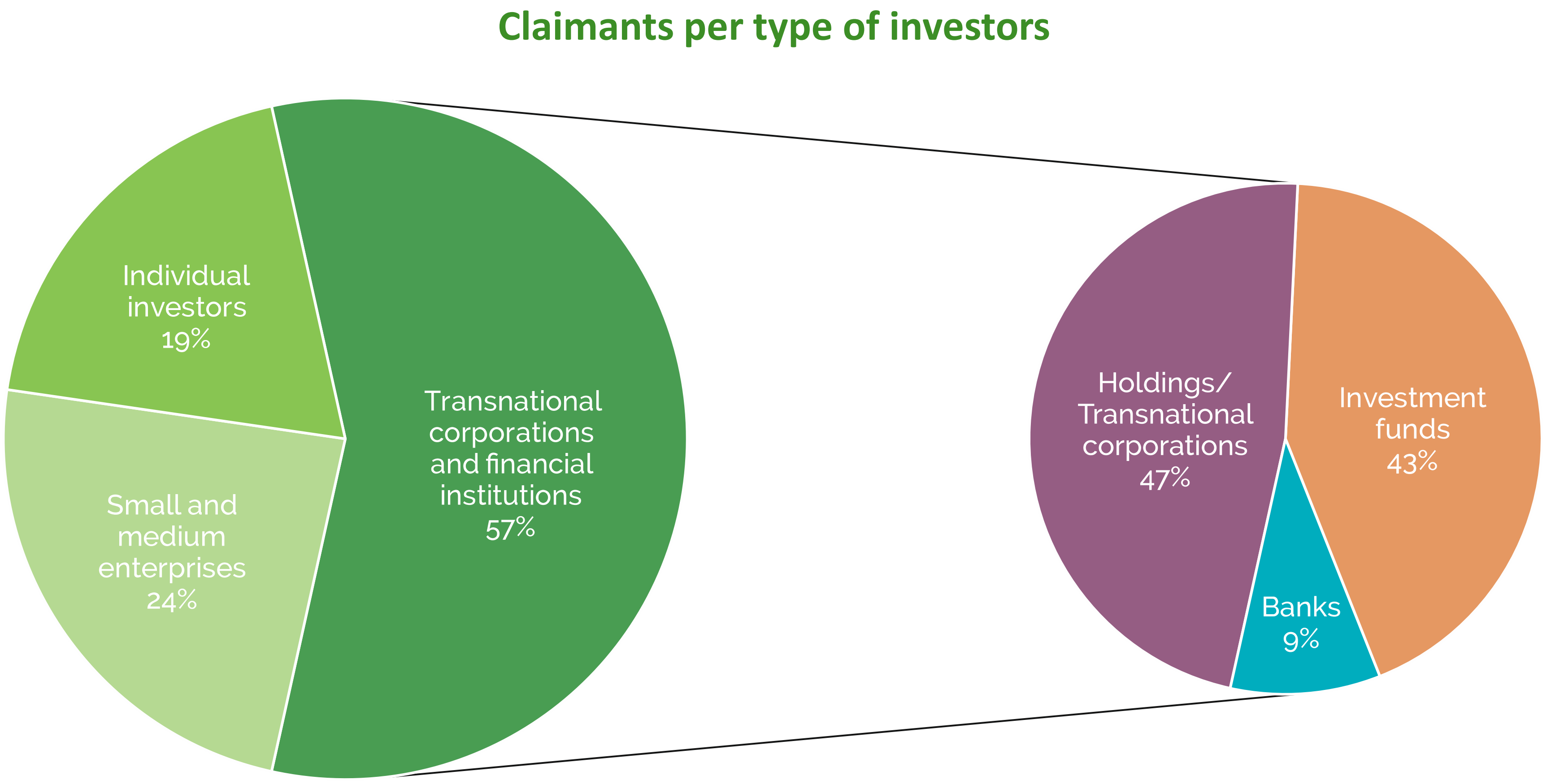
Spain is the most respondent State and the Netherlands is the host State of the highest number of claimants

Average ISDS cost is estimated at €110 million and average cost of legal and arbitration fees is estimated at €4,5 million



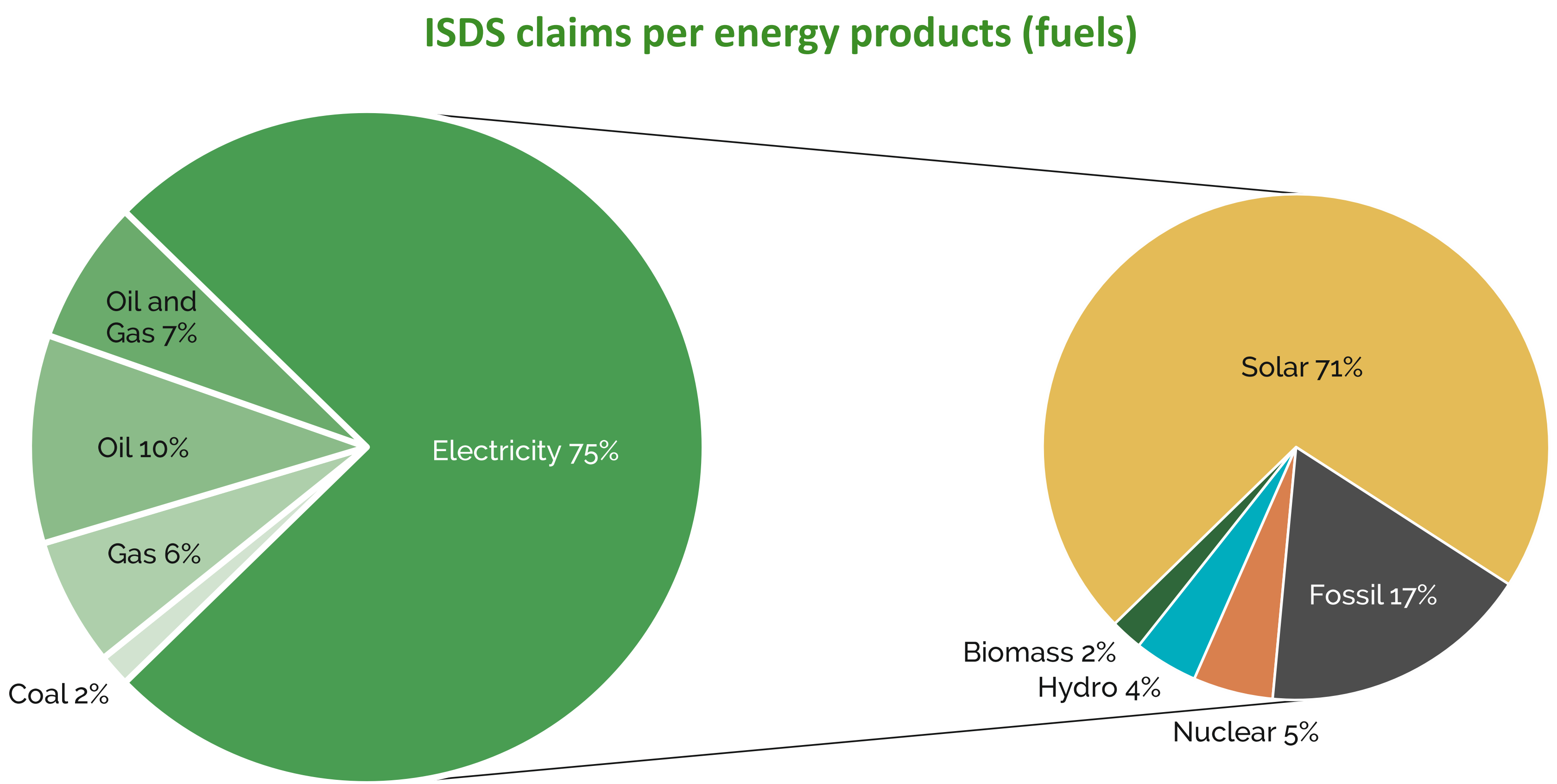
Decisions in favour of a State do not lead to zero cost for taxpayers as the defendant State has to pay for legal and arbitration fees

Taxes paid by domestic investors (SMEs and citizens) are used to pay high compensations for the protected foreign investors



More than half of the known ISDS ECT claims were brought by large transnational corporations and financial institutions

Breaches alleged under the ECT regime are mainly related to electricity deals with no distinction between energy sources



The alleged electricity breaches are related to changes in incentives in electricity production from renewable energy sources

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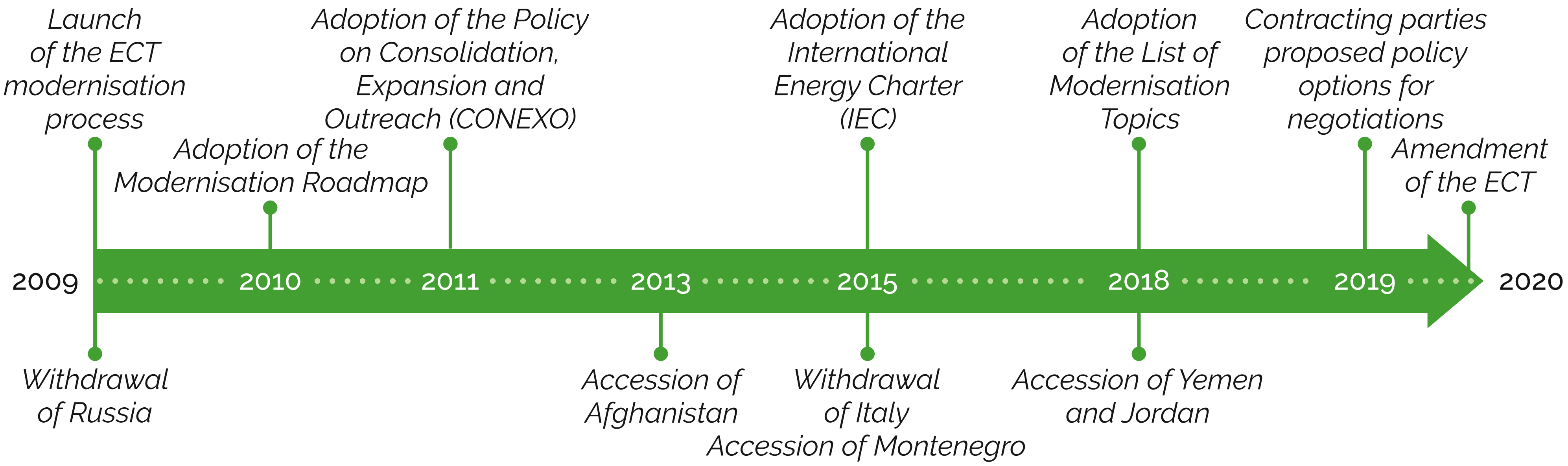
The ECT modernisation process is a lengthy process which started in 2009 with the withdrawal of Russia

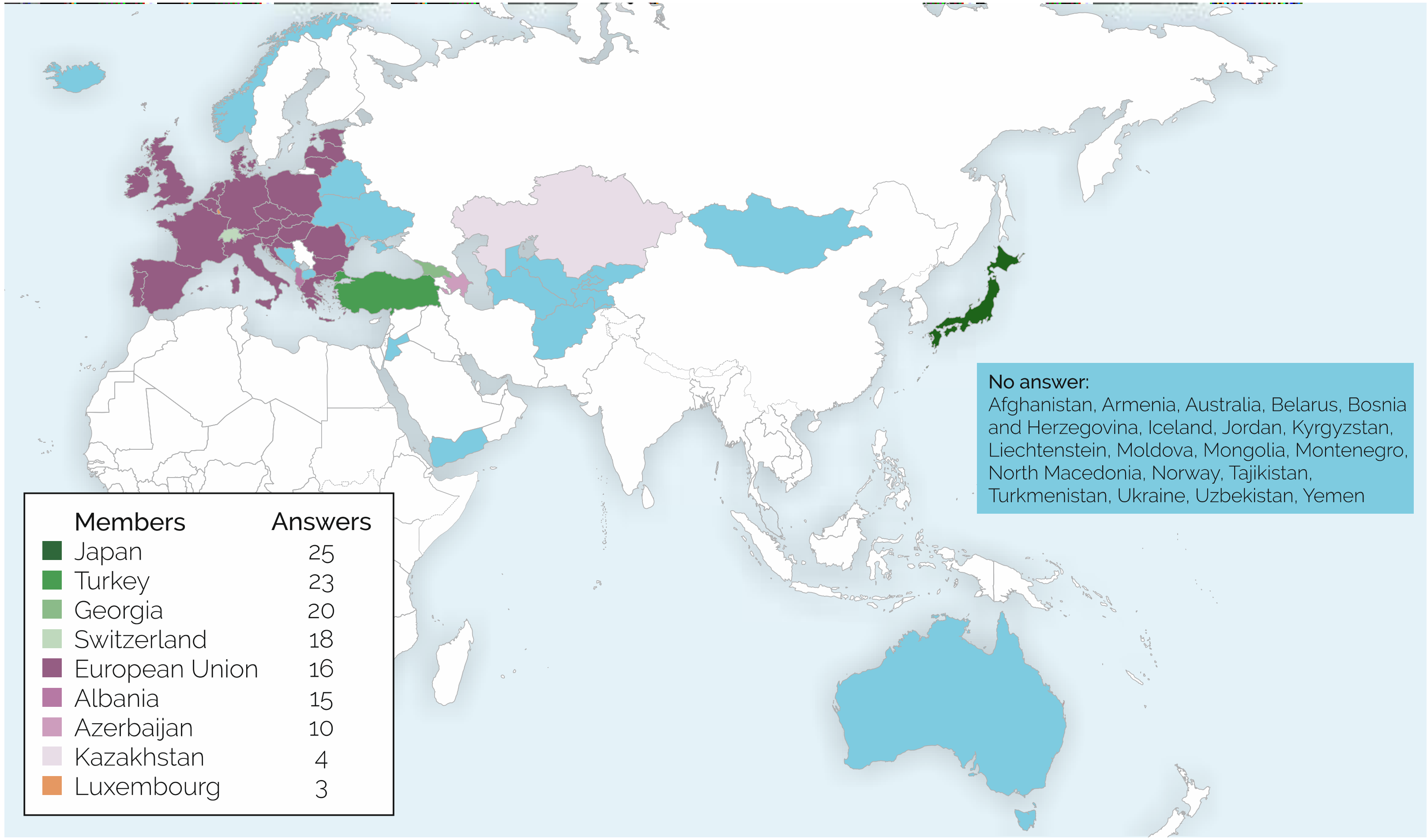
ECT modernisation process



Less than one year is planned for the negotiations of the policy options to modernise the ECT

40% of ECT constituency is not active in the modernisation of the Treaty

Contribution of ECT constituency to the 25 identified modernisation topics



Japan stands out by proposing to keep the current ECT provisions as they are for each of the 25 modernisation topics

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Achieving positive outcomes from ECT negotiations will be rather challenging given the voting rules and ECT constituency

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Legal instruments to introduce changes to the ECT

Instrument	Legal status	Voting rules	Modernisation topics for which the instrument was proposed	Contracting Parties who proposed the instrument
Clarification	Non-binding	Not defined	Indirect expropriation	Albania, Azerbaijan, the EU, Georgia, Switzerland, Turkey
			Regional Economic Integration Organisation	Kazakhstan
Declaration	Non-binding	Three-fourths majority	▪ Sustainable Development	Turkey
Protocols	Binding	Three-fourths majority	▪ Frivolous claims ▪ Security for costs ▪ Valuation of damage	Turkey
			▪ Third Party Funding	Georgia, Switzerland, Turkey
Amendments	Binding	Unanimity	23 modernisation topics	Albania, Azerbaijan, the EU, Georgia, Kazakhstan, Luxembourg, Switzerland, Turkey

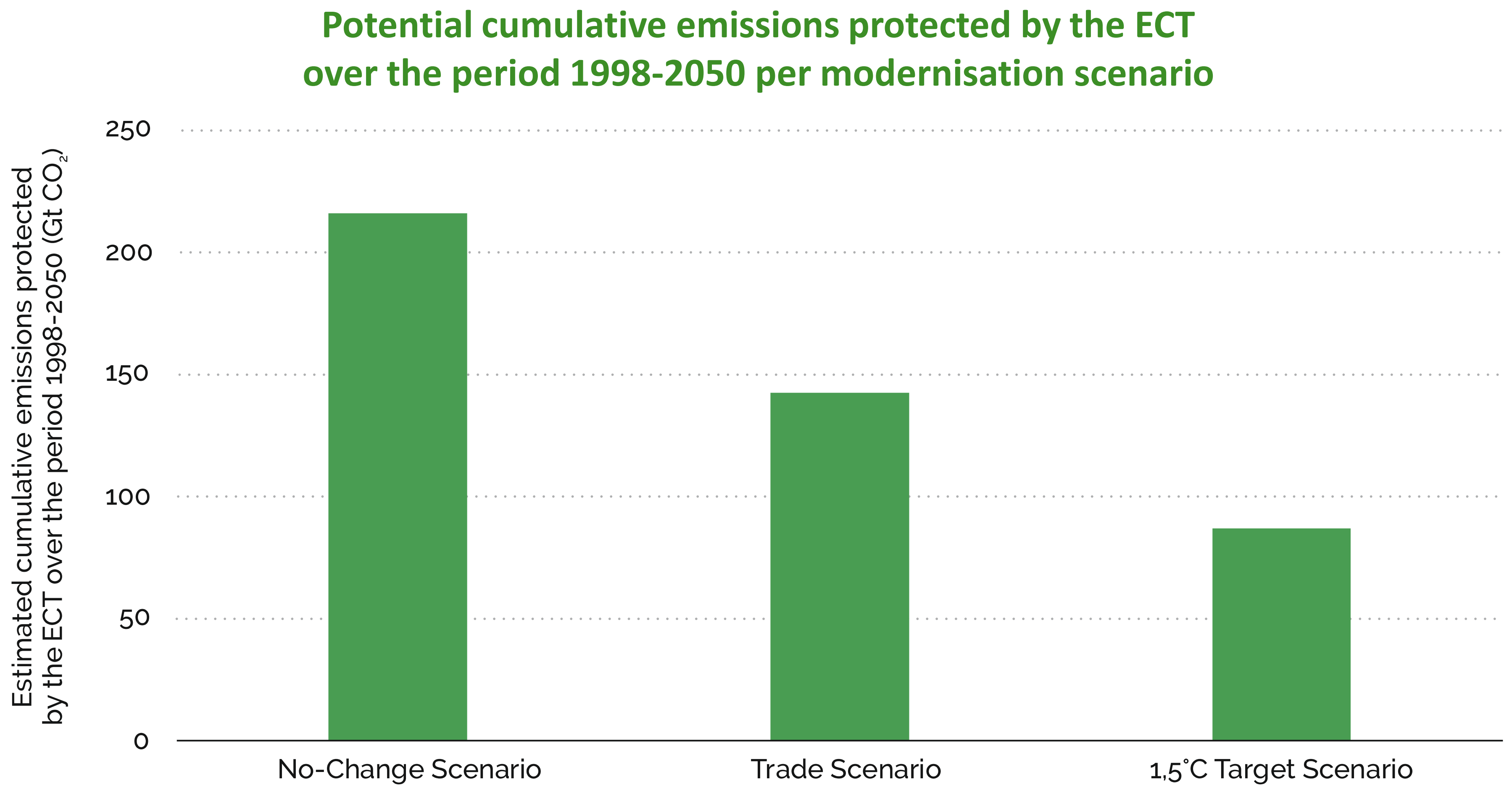
Amendments, which require unanimity vote, represent the most favoured option of Contracting Parties

ECT modernisation is unlikely to deliver an environmental friendly Treaty which contributes to the Just Energy Transition

The three major concerns raised after more than two decades of ECT existence are not on the negotiating table:

- The phase-out of the binding protection of foreign investments in unstainable fuels (fossil fuels and nuclear).
- The end of Investor-State-Dispute-Settlement (ISDS).
- The end of intra-EU disputes.

The ECT cannot become a carbon neutral Treaty as almost three times the remaining EU carbon budget is already protected by the Treaty



Contracting Parties have the power to limit the "ecocide" effect of the ECT by phasing-out protection of foreign investments in fossil fuels

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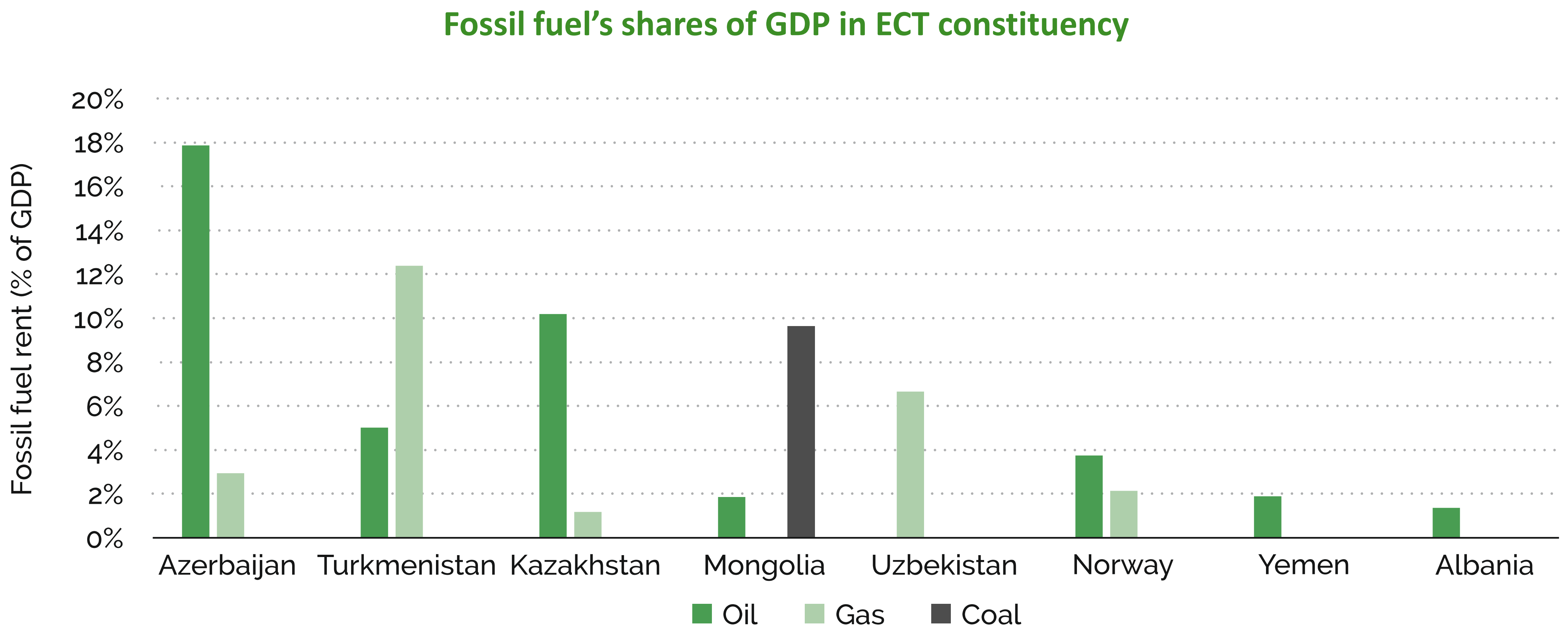
The cost of the continuation of the ECT is more than the investment needed to finance Europe’s Green Deal over the next ten years

The continuation of the binding protection of foreign investments in fossil fuels and ISDS under the “*modernised*” ECT will cost taxpayers trillion of Euros:

- Stranded fossil fuels assets protected by the ECT would potentially reach at least €2.15 trillion by 2050 if fossil fuels are not phased-out from ECT binding investment protection.
- The potential cost of ISDS claims would reach at least €1.3 trillion by 2050 out of which 42% will be paid by EU taxpayers.

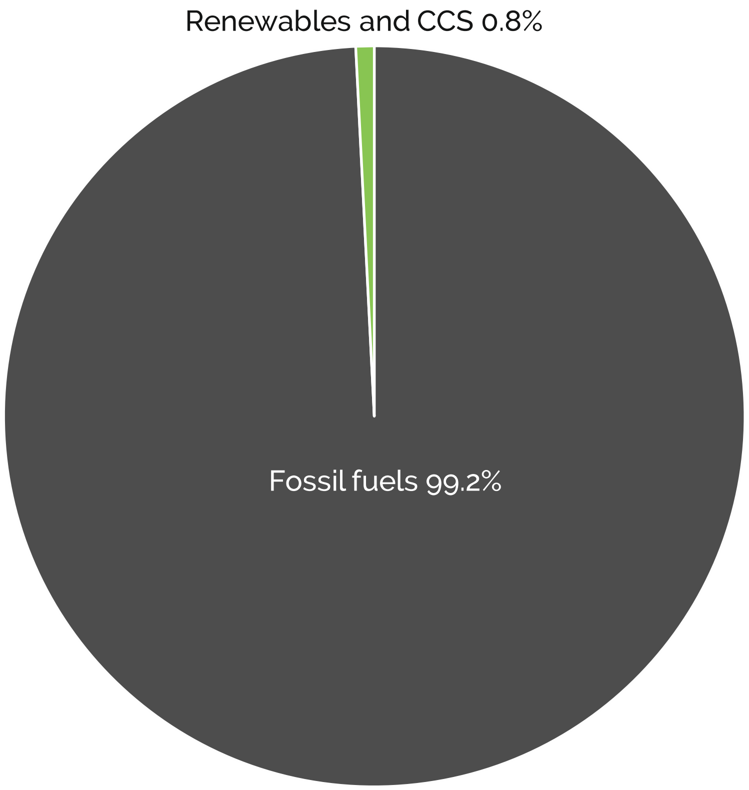
Phasing-out fossil fuels from ECT investment protection is hardly achievable given the ECT constituency and the unanimity vote required



At least seven ECT signatories would, potentially, not vote to phase-out protection of foreign investments in fossil fuels

Fossil fuel industry will use all the possible means to ensure the continuation of the ECT and its protection of fossil fuels

Oil and gas industry capital investment in 2019



Investments in clean energy solutions do not follow the announcements made by fossil fuel industry since the signature of the Paris Climate Agreement

Source: Dr Evans (Carbon Brief) based on IEA data

The continuation of the ECT will lock developing countries in carbon at a high cost

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Status of accession countries to the ECT

Countries formerly invited by the Energy Charter Conference to accede to the ECT *Burundi, Eswatini, Mauritania, Pakistan*
Countries working on their internal approval of the three accession reports *Bangladesh, Chad, China, Morocco, Niger, Serbia, Uganda*
Countries developing their three accession reports *Cambodia, Colombia, Guatemala, Nigeria, Panama, The Gambia*

Several developing countries are at risk to be trapped by the ECT regime and its binding protection of foreign investments in fossil fuels and nuclear

All ECT signatories must become carbon neutral before 2050 as they have all ratified the Paris Climate Agreement

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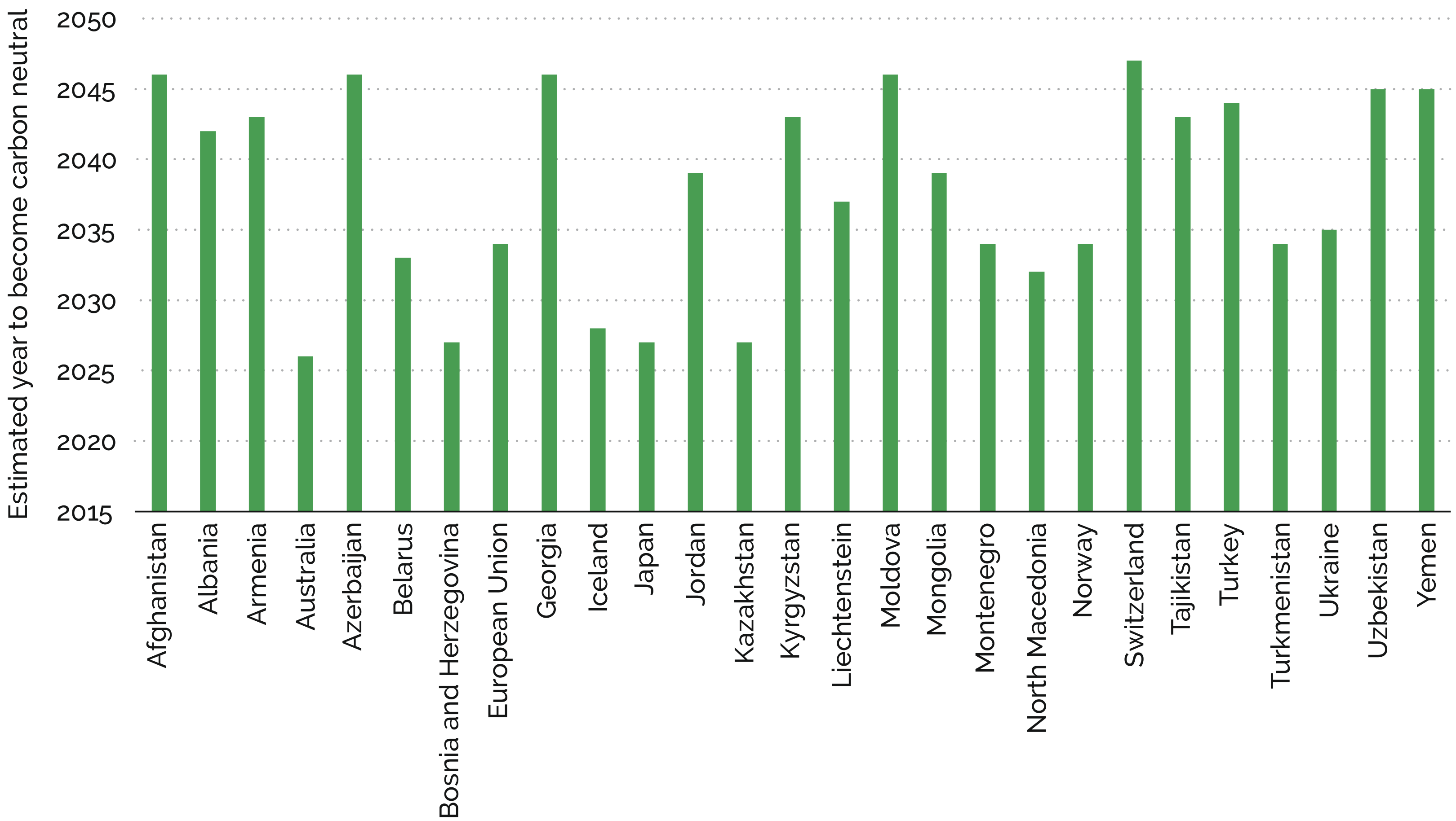
Estimated year to become carbon neutral for each ECT Contracting Party



Carbon neutrality requires phasing-out fossil fuels earlier than ever thought

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The unanimity vote required to amend the ECT and the gaps in climate policies between ECT signatories make ECT modernisation hardly achievable

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- Phasing-out protection of foreign investments in fossil fuels and ending ISDS & intra-EU disputes require amending the ECT.
- Amending the Treaty requires unanimity vote, of all ECT signatories participating to the modernisation, which is hardly achievable.
- The EU and its Member States cannot on one hand phase-out the use of public finance for domestic investments in fossil fuels, through the EIB energy lending policy and on the other hand sign off on the continuation of protection of foreign investments in fossil fuels under the ECT.
- The continuation of the ECT is a serious threat to Europe's Green Deal, its Just Energy Transition objective and the Paris Climate Agreement.
- The only option left for the EU and its Member States is to withdraw collectively from the ECT.
- The collective withdrawal would allow ending intra-EU disputes under the ECT regime and its survival clause for intra-EU investments.

Thank you for your attention

The report is available at the link below

https://www.openexp.eu/sites/default/files/publication/files/modernisation_of_the_energy_charter_treaty_a_global_tragedy_at_a_high_cost_for_taxpayers-final.pdf