King's Law Journal

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rklj20

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Tibisay Morgandi & Lorand Bartels

To cite this article: Tibisay Morgandi & Lorand Bartels (2023) Exiting the Energy Charter Treaty under the law of treaties, King's Law Journal, 34:1, 145-169, DOI: 10.1080/09615768.2023.2196834

To link to this article: https://doi.org/10.1080/09615768.2023.2196834

King's Law Journal, 2023
Vol. 34, No. 1, 145–169, https://doi.org/10.1080/09615768.2023.2196834

Exiting the Energy Charter Treaty under the law of treaties

Tibisay Morgandi and Lorand Bartels*

1. INTRODUCTION

The origins of the Energy Charter Treaty ('ECT')[1] lie in the collapse of the Soviet Union in the early 1990s, which led Western European states to seek to secure supplies of hydrocarbon energy from countries in the former Soviet bloc, where these resources were located; in exchange, these countries would receive foreign investment, technical cooperation and be able to trade more easily with Western Europe.[2] To this end, the ECT set out provisions on free trade and transit, based on the General Agreement on Tariffs and Trade ('GATT') 1947, as well as provisions on investment promotion and protection in the energy sector. Despite its original focus on Europe and countries of the former Soviet Union, the ECT's final geographical coverage was broader: it was open to states from all parts of the globe, and these came to include, in addition to Western European countries and those of the former Soviet bloc, Afghanistan, Australia, Japan, Jordan, Mongolia, Turkey and Yemen.[3]

* Tibisay Morgandi is Assistant Professor of International Energy Law, Queen Mary University of London. Lorand Bartels is Professor of International Law, University of Cambridge. The authors wish to express their gratitude to Federico Ortino for his extremely helpful comments on a draft of this article. Email: t.morgandi@qmul.ac.uk and lab53@cam.ac.uk.

1 Energy Charter Treaty, signed 17 December 1994, in force 16 April 1998.

2 The idea underlying the ECT was first proposed to the EEC Council on 25–26 June 1990. This led to the European Energy Charter, signed 17 December 1991, which is referenced in the preamble to the ECT. See, generally, Julia Doré, 'Negotiating the Energy Charter Treaty' in Thomas Wälde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer 1996), at 138-39; Kaj Hobér, *The Energy Charter Treaty: A Commentary* (OUP 2020), at 14-15.

3 The ECT currently has 51 contracting parties, and one signatory (Norway) that is provisionally applying the ECT. Belarus is also a signatory and was provisionally applying the ECT but was suspended on 24 June 2022. See https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/.

In recent years, the ECT's investment regime has come under pressure from different quarters. First Russia, then Italy and most recently Australia withdrew from the treaty,[4] as part of a policy shift away from investor-state dispute settlement. In the case of Russia and Italy, this was done after being sued under the ECT for claims worth many hundreds of millions of dollars.[5] In addition, in *Achmea* the EU Court of Justice interpreted the EU treaties as precluding investor-state dispute settlement between EU investors and EU Member States,[6] requiring the EU and its Member States to implement this ruling at the international level.[7] Third, and most importantly, the ECT's investment regime has come to be seen as a major obstacle in combatting climate change,[8] because it radically increases the cost of adopting climate change measures due to potential claims for compensation,[9] which leads to a regulatory chill in adopting such measures, contrary to the contracting parties' commitments under the Paris Agreement.[10,11]

Largely as a response to these challenges, in 2017 the ECT contracting parties began discussing a possible modernisation of the ECT, which led, among other things, to proposed reforms to the system of investor-state dispute settlement, a carve out for 'intra-EU' disputes, and time limits on protection for fossil fuel investments.[12] At the same time, however, civil society began to demand a complete withdrawal from the ECT,

4 Russia (termination of provisional application effective 18 October 2009), Italy (withdrawal effective 1 January 2016); Australia (termination of provisional application effective 13 December 2021).

5 Russia was sued in three parallel proceedings: see *Yukos v Russia*, PCA Case No AA 227, *Hulley Enterprises v Russia*, PCA Case No AA 226 and *Veteran Petroleum v Russia*, PCA Case No AA 228, 18 July 2014; each of the three claimants claimed $114bn. Italy was sued in *Blusun et al v Italy*, ICSID Case No ARB/14/3, Award 27 December 2016, prior to notifying its withdrawal; the claimants claimed €188m.

6 Case C-284/16, *Slovak Republic v Achmea BV*, ECLI:EU:C:2018:158 (6 March 2018). Specifically with reference to the ECT, Case C-741/19, *Republic of Moldova v Komstroy LLC*, ECLI:EU:C:2021:655 (2 September 2021).

7 The situation for the ECT is discussed below *passim*. For intra-EU BITs, see the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union [2020] OJ L169/1.

8 See eg Lea Di Salvatore, *Investor-State Disputes in the Fossil Fuel Industry* (IISD 2021), at 16.

9 See Kyla Tienhaara and Lorenzo Cotula, 'Raising the Cost of Climate Action? Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets' (IIED 2020) and Kyra Bos and Joyeeta Gupta, 'Stranded Assets and Stranded Resources: Implications for Climate Change Mitigation and Global Sustainable Development' (2019) 56 *Energy Research and Social Science* 1, at 1-15. Leading cases include *Vattenfall et al v Germany*, ICSID Case No ARB/09/6, Award 11 March 2011 settled; *RWE et al v Netherlands*, ICSID Case No ARB/21/4, pending; and *Uniper et al v Netherlands*, ICSID Case No ARB/21/22, withdrawn. In *Rockhopper et al v Italy*, ICSID Case No ARB/17/14, Award 23 August 2022, Italy was reportedly ordered to pay €190m plus interest for costs incurred and potential lost profits.

10 Paris Agreement, signed 12 December 2015, in force 4 November 2016.

11 See, eg, Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2018) 7 *Transnational Environmental Law* 229, at 229-250.

12 The 25 topics proposed for modernisation, with comments from ECT contracting parties, are set out in Energy Charter Secretariat, Policy Options for Modernisation of the ECT, CCDEC 2019 08 STR (6 October 2019).

on the grounds that the ECT impairs 'a clean energy transition'[13] and that governments cannot 'have their hands tied while facing the climate emergency'.[14] The Intergovernmental Panel on Climate Change ('IPCC') also singled out the ECT's investor-state dispute settlement system as a mechanism 'designed to protect the interests of investors in energy projects from national policies that could lead their assets to be stranded'.[15] It is important to note that the ECT is unusual among investment treaties, because it was concluded primarily to protect fossil fuel investments.[16]

In June 2022, a final 'Agreement in Principle'[17] on a modernised ECT was reached between the contracting parties,[18] but, due to the objections of some contracting parties,[19] it was notably less ambitious on climate change than the EU and several EU Member States had hoped.[20] Two examples are emblematic. First, the EU had proposed an obligation stating that 'each Contracting Party shall … effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contribution'.[21] This was watered down to a non-binding provision that merely 'reaffirm[ed] [each contracting party's] respective rights and obligations under multilateral environmental and labour agreements to which it is a party, such as … the UNFCCC, the Paris Agreement'.[22] The EU had also

13 End Fossil Protection, 'Open Letter from Climate Leaders and Scientists to Signatories of the Energy Charter Treaty (ECT)' (2020) available at https://endfossilprotection.org/.

14 Friends of the Earth Europe and Climate Action Network, 'Civil Society Organisations' Statement Against the Energy Charter Treaty (2021) available at http://s2bnetwork.org/wp-content/uploads/2021/07/CSO-Statement-.pdf.

15 IPCC, Sixth Assessment Report, 2022 Climate Change: Mitigation of Climate Change (April 2022), Ch 14, at 1505-1506.

16 This also explains the express reference to sovereignty over natural resources in Article 18 ECT.

17 Agreement in Principle on the Modernisation of the Energy Charter Treaty, Annex to Energy Charter Secretariat Doc CC 750 Rev, 24 June 2022; contained in EU Council, Working Document, Energy Charter Treaty Modernisation, Doc WK 9218/2022 INIT, 27 June 2022, available at https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf.

18 The UK government welcomed the 'Agreement in Principle', stating that '[t]he modernised treaty … will have a much stronger focus on promoting clean, affordable energy [and] protect the UK government's sovereign right to change its own energy systems to reach emissions reduction targets in line with the Paris Agreement'. See UK Department for Business, Energy & Industrial Strategy, 'UK Strengthens Protection for Taxpayers in Energy Treaty Negotiations' (Press Release, 24 June 2022) available at https://www.gov.uk/government/news/uk-strengthens-protections-for-taxpayers-in-energy-treaty-negotiations.

19 See eg Japan, which, in a document collecting comments from the contracting parties on the 25 topics considered for modernisation, consistently stated in relation to each topic that it 'believe[d] [it is] not necessary to amend the current ECT provisions'. See above at n 12, at 12.

20 European Union, EU Text Proposal for the Modernisation of the Energy Charter Treaty (19 May 2020), available at https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf and European Union, Additional Submission to the Text Proposal for the Modernisation of the Energy Charter Treaty (February 2021), available at https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159436.pdf. For an analysis, see Lukas Schaugg and Sarah Brewin, 'Uncertain Climate Impact and Several Open Questions: An Analysis of the Proposed Reform of the Energy Charter Treaty' (IISD 2022).

21 See 'EU Text Proposal', above at n 20, Part IV, New Article on Sustainable Development – Climate Change and Clean Energy Transition, at 11.

22 Article 19(2) of the Agreement in Principle, above at n 17.

proposed an amendment under which protection for new fossil fuel investments would have ceased on 15 August 2023, and protection for existing investments 10 years after the entry into force or provisional application of the amendment, and by 2040 at the latest.[23] The original proposal would have applied to all of the parties agreeing to the amendment, but in the final version this carveout would only have applied to contracting parties on an elective basis.[24] The results were greatly disappointing to many of the EU Member States – in the words of the Dutch Energy and Climate Minister, '[w]e do not see how the ECT has been sufficiently aligned with the Paris Agreement'.[25]

An Energy Charter Conference was scheduled for 22 November 2022, at which the Agreement in Principle was to be submitted for approval. But in the months leading up to this date, events moved quickly. On 10 August 2022, Poland adopted a draft law on withdrawal from the Energy Charter Treaty.[26] On 5 October, the European Commission issued a Communication[27] proposing an *inter se* agreement[28] between the EU[29] and its Member States that would clarify that the entire ECT, including its substantive and dispute settlement provisions, and specifically its sunset clause, did not and will not apply 'in intra-EU relations' (but grandfathering awards concluded prior to 6 March 2018, the date of the CJEU's *Achmea* judgment).[30] Between 12 October and 18 November, six more Member States announced that they were considering withdrawing from the ECT.[31] Together with Italy, which had already withdrawn from the ECT in 2016, this represented over 70 per cent of the EU population. On 18 November, a

23 European Union, Additional Submission, above at n 20, Article 1 Definitions.

24 Agreement in Principle, above at n 17, Annex NI, Sections B and C. See also Johannes Tropper and Kilian Wagner, 'The European Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investments Treaties?' (2022) 23 *Journal of World Investment and Trade* 813, at 828.

25 Karl Mathiesen, 'The Netherlands to Leave Embattled Energy Charter Treaty' (Politico, 18 October 2022), available at https://www.politico.eu/article/netherlands-leave-embattled-energy-charter-treaty-rob-jetten/.

26 Draft Law on the Termination of the Energy Charter Treaty (10 August 2022) available in Polish at https://www.gov.pl/web/premier/projekt-ustawy-o-wypowiedzeniu-traktatu-karty-energetycznej-oraz-protokolu-karty-energetycznej-dotyczacego-efektywnosci-energetycznej-i-odnosnych-aspektow-ochrony-srodowiska-sporzadzonych-w-lizbonie-dnia-17-grudnia-1994-r.

27 European Commission, Communication on an Agreement between the Member States, the European Union, and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty, COM(2022) 523 final (5 October 2022).

28 Such an *inter se* agreement would reflect the removal of investor-state dispute settlement in the Agreement in Principle as between EU Member States, on which see below at n 30, but it would go further by also removing the application of the ECT's substantive protections as between EU Member States. The treaty law aspects of this *inter se* agreement are discussed below in Section 3.

29 The EU and Euratom are both ECT contracting parties but are referred to here as the 'EU'.

30 The EU proposed an amendment to the ECT that would clarify that the ECT's provisions on investor-state and state-state dispute settlement 'shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation [ie the EU] in their mutual relations'. See draft Article 24(3) of the Agreement in Principle, above at n 17.

31 Spain said this on 12 October 2022, followed by the Netherlands on 19 October 2022, France on 21 October 2022, Slovenia on 10 November 2022, Germany on 11 November 2022 and Luxembourg on 18 November 2022. France, Germany and Poland formally notified their withdrawal in December 2022. See below at n 34.

European Commission proposal to adopt the modernised ECT was rejected by the EU Permanent Representatives Committee (Coreper), and the Commission promptly requested the removal of the topic from the agenda of the Energy Charter Conference scheduled for 22 November.[32] On 24 November, the European Parliament adopted a resolution calling for the EU and the Member States' 'coordinated exit' from the ECT.[33] In December, France, Germany and Poland notified in writing their withdrawal from the ECT.[34] In February 2023, the European Commission issued a non-paper stating that the EU's withdrawal appeared to be 'unavoidable'.[35]

The position of the UK is currently unknown, although there is reason to believe that it may follow suit. A recent study estimates that the UK would be the ECT contracting state benefiting the most from exiting the treaty, 'avoiding liability for $5.3 billion worth of oil/gas projects on average',[36] and it is perhaps not coincidental that, during the modernisation process, the UK drafted a proposed carve out on protection of fossil fuel investments drawing on the EU's proposal, albeit with slightly different timelines for different energy materials.[37] There is also domestic pressure to withdraw. On 9 February 2023, a group of over 100 academics called upon the UK government to abandon the treaty, arguing that 'continued membership of the ECT will harm [the UK's] prospects of limiting global warming to 1.5°C because it will prolong the UK's dependence on fossil fuels and impede the transition to renewable energy'.[38]

This call has been recently reiterated by Chris Skidmore, a former UK Energy Minister and current Chair of the UK's Net Zero Review, who published an opinion piece encouraging the UK to 'begin the process of co-leading an orderly withdrawal from the treaty' alongside 'like-minded partner countries like Germany, France and the

32 The vote on the modernised text has been postponed to April 2023.

33 European Parliament Resolution, Outcome of the Modernisation of the Energy Charter Treaty, 2022/2934(RSP) (24 November 2022), para 18. This was not the first occasion on which some EU Member States had considered the possibility of a 'coordinated withdrawal' from the treaty. In fact, a diplomatic cable dated 6 April 2022 reported that, during the negotiations on the modernisation of the ECT, Spain had already expressed concerns in relation to the ability to adapt the ECT to the Paris Agreement and Germany and Poland had expressly asked the Commission to start investigating options for a coordinated withdrawal. See Trade Policy Committee (Trade and Investment) Meeting on 6 April 2022, ITEM 4: Energy Charter Treaty, available at https://www.euractiv.com/wp-content/uploads/sites/2/2022/05/ECT-Cable-reports-April-May-2022.pdf.

34 France's withdrawal will take effect on 8 December 2023, Germany's withdrawal on 21 December 2023, and Poland's withdrawal on 29 December 2023. Energy Charter Secretariat, Written Notifications of Withdrawal from Energy Charter Treaty (22 March 2023), available at https://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/.

35 Euractiv, 'LEAK: Exit from Energy Charter Treaty 'Unavoidable', EU Commission Says' (8 February 2023) available at https://www.euractiv.com/section/energy/news/exit-from-energy-charter-treaty-unavoidable-eu-commission-says/.

36 Kyla Tienhaara et al, 'Investor-State Dispute Settlement: Obstructing a Just Energy Transition' (2022) *Climate Policy*, at 10.

37 Agreement in Principle, above at n 17, Annex NI, Sections B(3) and C(2).

38 Letter to Energy Secretary Grant Shapps Urging UK Government to Exit Energy Charter Treaty (9 February 2023), available at https://warwick.ac.uk/fac/soc/law/research/centres/chrp/governance/energycharter/.

Netherlands'.[39] Besides arguing that 'the treaty is not suited for twenty-first century challenges' and that it 'is driving up the cost of the energy transition, while slowing it down', he warned that the modernisation of the treaty, previously supported by the UK,[40] is no longer a viable option.[41] In his words, '[w]ithout support from the UK's traditional allies for the reform process continuing, it will be impossible for the country to push through changes on its own against the remaining, less climate ambitious members.'[42] On 21 February 2023, 15 MPs from the UK's all-party parliamentary group for the environment endorsed this call for withdrawal from the ECT in a letter addressed to the Minister for Energy Security and Net Zero, on the grounds, inter alia, that the 'ECT makes the UK less attractive for clean energy investments … [and] creates a policy landscape that is tilted against clean energy, and which exposes UK finances to huge litigation risk'.[43]

2. THE ECT'S 'SUNSET' CLAUSE

One of the key consequences of withdrawing from the ECT[44] is that protection of existing investments (including fossil fuel investments) will not cease until twenty years after withdrawal becomes effective. Article 47(3) of the ECT – a 'sunset' clause – provides as follows:

> The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.[45]

There is nothing unusual about sunset clauses: no fewer than 97 per cent of investment agreements contain clauses of this type.[46] Obviously, from the perspective of the investor, such clauses are important, as they guarantee the long-term value of their investments, and they may even be an underlying condition for making those investments

39 Chris Skidmore, 'Britain Must Leave the Energy Charter Treaty' (Financial Times, 5 March 2023), available at https://www.ft.com/content/98d3d302-116b-4835-8762-fb9f5a71e855.

40 See above at n 18.

41 Chris Skidmore, 'Britain Must Leave the Energy Charter Treaty', above at n 39.

42 *Ibid.*

43 Chris Skidmore, Energy Charter Treaty Debate, Westminster Hall (21 March 2023), available at https://www.parallelparliament.co.uk/mp/chris-skidmore/debate/2023-03-21/commons/westminster-hall/energy-charter-treaty.

44 Withdrawal is expressly contemplated under the ECT at Article 47. This is a standard provision on withdrawal providing for an initial minimum period before a party is allowed to withdraw from the treaty (five years from the date on which the ECT has entered into force for that party) and a one-year gap before the withdrawal becomes effective. Articles 47(1) and Article 47(2) ECT.

45 Article 45(3)(b) ECT is an equivalent sunset clause for ECT signatories terminating their provisional application of the ECT.

46 Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World', *OECD Working Papers on International Investment* (OECD Publishing 2015), at 19.

in the first place. However, in the particular context of climate change, sunset clauses represent a significant obstacle to contracting parties wishing to adopt climate change measures even after they withdraw from the treaty. Indeed, since notifying its withdrawal from the ECT at the end of 2014, Italy was sued five times in the year before withdrawal became effective,[47] and has been sued another seven times under the sunset clause.[48] Nine disputes relate to the same regulatory measure.

An important question, then, is whether there is any way for contracting parties withdrawing from the ECT to exclude the application of the sunset clause to existing investments. At present this is a live question for the EU and some of its Member States and it would also be a question for the UK, should the UK decide to leave the ECT.

In a non-paper published on 7 February 2023, the European Commission considered this issue from several perspectives.[49] Its starting point is specific to the EU, in that the non-paper asserts that the sunset clause does not (and never did) apply as between the EU Member States. Nonetheless, it acknowledges that 'arbitral tribunals have often taken a different view'.[50] Thus, the non-paper proposes to clarify the matter by means of an *inter se* agreement between the EU and its Member States.[51] Such an agreement would essentially be a continuation (or resurrection) of the *inter se* agreement proposed by the Commission on 5 October 2022. The non-paper also however considers how the sunset clause could be avoided in relations with non-EU ECT contracting parties. It suggests that this could be done by concluding an *inter se* agreement with them.[52]

This sets the scene for the issues addressed in this article, which are twofold. The first concerns the means by which ECT contracting parties may agree to exclude the operation of the sunset clause *inter se*. The second, which is admittedly more conjectural, is whether an ECT contracting party may be able to withdraw from the ECT, including its sunset clause, on the

47 *Greentech Energy Systems A/S et al v Italy*, SCC Case No 095/2015, Award 23 December 2018, amount claimed €25m, awarded in favour of the investor for €12m, enforcement stayed until further notice; *Silver Ridge Power BV v Italy*, ICSID Case No ARB/15/37, Award 26 February 2021, awarded in favour of the state; *Belenergia SA v Italy*, ICSID Case No ARB/15/37, Award 28 August 2019, amount claimed €19m, awarded in favour of the state; *Eskosol SpA in liquidazione v Italy*, ICSID Case No ARB/15/50, Award 4 September 2020, amount claimed €197m, awarded in favour of the state; *CEF Energia BV v Italy*, SCC Case No 158/2015, Award 16 January 2019, amount claimed €10m, awarded in favour of the investor for €9m, enforcement stayed until further notice.

48 *ESPF Beteiligungs Gmbh et al v Italy*, ICSID Case No ARB/16/5, Award 14 September 2020, amount claimed €28m, awarded in favour of the investor for €16m; *VC Holding II Sarl et al v Italy*, ICSID Case No ARB/16/39, pending; *Sun Reserve Luxco Holdings Sarl et al v Italy*, SCC Case No 132/2016, Award 25 March 2020, amount claimed €40m, awarded in favour of the state; *Veolia Propreté SAS v Italy*, ICSID Case No ARB/18/20, pending; *Hamburg Commercial Bank v Italy*, ICSID Case No ARB/20/3, pending; *Encavis et al v Italy*, ICSID Case No ARB/20/39, pending. See also *Rockhopper et al v Italy*, above at n 9.

49 European Commission, Non-Paper from the European Commission: Next Steps as Regards the EU, Euratom and Member States' Membership in the Energy Charter Treaty (Euractiv, 7 February 2023), available at https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf

50 *Ibid*, at 6.

51 *Ibid*.

52 *Ibid*. The European Commission acknowledged that this could be 'challenging given the current position of non-EU Contracting Parties on the ECT as a whole, and their possible business interests currently covered by the ECT', at 6.

basis of the doctrine of fundamental change of circumstance (*rebus sic stantibus*), which is codified in Article 62 of the Vienna Convention on the Law of Treaties ('Vienna Convention'). As is well known, while treaty parties have occasionally invoked *rebus sic stantibus*, it has almost never been successful. Malgosia Fitzmaurice even calls the plea of *rebus sic stantibus* a 'theoretical possibility'.[53] Nonetheless, this is essentially the popular argument for leaving the ECT. As the academics' open letter to the UK Government put it:

> The ECT was created almost 30 years ago, in the context of the end of the Cold War and when there was less understanding of and consensus around the human drivers of climate change. The context has changed significantly: we have a very limited time to undertake a drastic reduction in greenhouse gas emissions.[54]

It is therefore worth giving serious consideration to the question whether the strict legal conditions for *rebus sic stantibus* might indeed be satisfied in this case. To complete this analysis, this article considers the legal consequences of withdrawal from the ECT, pursuant to Article 70 of the Vienna Convention for the remaining treaty parties.

3. EXCLUDING THE APPLICATION OF THE ECT SUNSET CLAUSE *INTER SE*

3.1. Options

As noted, simply withdrawing from the ECT does not exclude the operation of its sunset clause; indeed, this is precisely the trigger for its application for twenty years after withdrawal becomes effective. This is equally true of a 'coordinated withdrawal' by several ECT contracting parties. What is required is an express agreement that excludes the operation of the sunset clause as between the parties to that agreement. Such an agreement, it should be said, would not be an agreement to terminate the ECT, even between the parties to the agreement. The termination of the ECT would require agreement by all ECT contracting parties, and this is not presently foreseeable.[55]

This leaves two options. The first is an agreement to amend the ECT, which is the route that was chosen for the Agreement in Principle. This would also require a unanimous decision by all ECT contracting parties (and signatories) within the Energy Charter Conference,[56] even if the amendment only applies, relevantly, to a subset of ECT

53 Malgosia Fitzmaurice, 'Exceptional Circumstances and Treaty Commitments' in Duncan Hollis (ed), *The Oxford Guide to Treaties* (OUP 2020), at 608.

54 Letter to Energy Secretary Grant Shapps, above at n 38.

55 There is no concept of termination of agreements *inter se*. Under Article 54(b) of the Vienna Convention, termination (as opposed to withdrawal, whether 'coordinated' or not) requires the agreement of all of the parties, and consultation with contracting states (Norway, in this case). See also Julian Berger, *International Investment Protection within Europe* (Routledge 2021), at 179. State practice on the termination of investment agreements including their sunset clauses by mutual agreement is therefore not relevant to the present discussion.

56 Article 36(1)(a) ECT.

contracting parties.[57] This option would be effective, but is not further considered, as it raises political rather than legal issues, and at present it does not in any event seem that such an agreement would be likely. The remaining option, then, which is considered here, is a modification of the ECT by a subset of ECT contracting parties. As will be described below, this is the option that was advanced by the European Commission in its October 2022 Communication, and again in its February 2023 non-paper, with respect to both 'intra-EU relations' and non-EU contracting parties (eg an EU/MS-UK agreement). This is also the nature of an *inter se* agreement that only involves non-EU ECT contracting parties (eg a UK-Switzerland agreement). These three constellations can be treated together, even though there might be some differences in the results.

3.2. *Inter se* Modification of the ECT Under Article 41 of the Vienna Convention

Article 41 of the Vienna Convention permits the *inter se* modification of a multilateral agreement, and its substantive conditions, as set out in its first paragraph, may be considered to codify customary international law.[58] It states as follows:

> Article 41 ('Agreements to modify multilateral treaties between certain of the parties only')
>
> 1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
>
> (a) the possibility of such a modification is provided for by the treaty; or
> (b) the modification in question is not prohibited by the treaty and:
> (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
> (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
>
> 2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

3.2.1. Inter se *interpretation agreements: do they exist?*

The first requirement is that the *inter se* agreement must modify the treaty. This is not the same as an agreement that interprets the treaty, which is a matter for Articles 31 and 32 of the Vienna Convention. In this respect, the *inter se* agreement proposed by the European Commission on 5 October 2022, and by implication also in its February

57 An amendment comes into force when approved (by ratification) by three quarters of the ECT contracting parties, but only for those contracting parties that approve the amendment: Article 42(4) ECT.

58 See, eg, Michael De Boeck, *EU Law and International Investment Arbitration* (Brill 2022), at 87-90.

2023 non-paper (the 'EU interpretation agreement'), is rather odd. Its preamble contains the following two recitals:

> RECALLING that the Member States, the European Union and EURATOM have informed the other Contracting Parties of the ECT of their intention to conclude this subsequent agreement on the interpretation of the ECT in conformity with the rules of customary international law as codified in Article 41(2) VCLT, and
>
> CONSIDERING that Article 41(2) VCLT applies a fortiori to any subsequent agreement within the meaning of Article 31(3)(a) regarding interpretation of the ECT … [59]

The EU interpretation agreement therefore purports to be a hybrid that both 'modifies' and 'interprets' the ECT. There is a good reason for wanting this agreement to fall under Article 41, and not under Article 31, which is that Article 31(3)(a) only applies to subsequent agreements that are concluded by *all* of the parties to the original treaty, not merely *some* of their parties.[60] Article 31(3)(a) does not cover *inter se* interpretation agreements; but nor does it expressly prohibit them. The question then is whether such *inter se* agreements can be authorised rather by Article 41. The preamble to the EU interpretation agreement gives the argument in favour: if Article 41 allows for multilateral agreements to be modified *inter se*, it should a fortiori allow for them to be interpreted *inter se*.

This argument requires consideration of several issues. To begin, some words are necessary on the relationship between interpretation and modification. Interpretation is about establishing the meaning of a text, while modification is about changing the application of the (interpreted) text to a set of facts. Modification involves the formal addition of a new element to the text, or the formal deletion of an existing element in the text. This last condition indicates that there are overlaps. To say that the word 'cat' includes (or does not include) 'panthers' and that a rule concerning 'cats' applies (or does not apply) to 'panthers' is functionally the same. One could say that such a rule is a modification because it uses the particular technique of adding to or deleting from the text, even if the result is functionally the same. One could however also say that this is not a modification, but an interpretation in the guise of a modification, because the same result could easily be achieved by interpretation. This makes a difference, because if Article 41 applies to disguised interpretations, it will subvert the unanimity rule in Article 31(3)(a). There is also another difference between interpretation and application, which concerns their temporal effects. As a

59 Preamble, Recitals 17 and 18, Subsequent Agreement on the Interpretation of the Energy Charter Treaty, Annex to the European Commission Communication, above at n 27.

60 ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, Commentary to Draft Conclusion 4, Paragraph 1, in Report of the Commission to the General Assembly on the Work of its Seventieth Session, UN Doc A/73/10, para 51, contained in *Yearbook of the International Law Commission 2018*, Vol II, Part Two, UN Doc A/CN.4/SER.A/2018/Add.1 (Part 2), at 33. See also *RENERGY Sàrl v Spain*, ICSID Case No ARB/14/18, Award 06 May 2022, para 371. For the contrary view, though not reasoned, see *Green Power Partners K/S et al v Spain*, SCC Case N V2016/135, Award 16 June 2022, para 370.

matter of legal fiction, because interpretation purports to declare on what the parties always intended, an interpretation operates *ex tunc*, while modification operates *ex nunc*. This is important in particular for decisions made on the basis of what is later discovered to have been an erroneous interpretation.

Based on these considerations, it is not at all clear that Article 41 permits the EU interpretation agreement. Article 41 may apply to disguised interpretation agreements, but this agreement openly purports to be an interpretation. It restates at several points that 'for greater certainty' the parties 'confirm' that the interpretations set out in the agreement apply and always applied *ex tunc*. And while it does create an exception for arbitration awards completed before 6 March 2018, this merely proves the point. Thus, even if Article 41 might cover modifications that are really disguised interpretations, due to the difficulty in distinguishing between the two, this does not mean that it also covers agreements that do not even purport to be modification agreements. To allow for that would be openly contrary to the unanimity rule in Article 31(3)(a). It might finally be noted that this has no effect on the CJEU's interpretation of the ECT, shared now by one investment tribunal,[61] according to which the ECT does not apply to 'intra-EU relations' (and never did); it just means that is not possible to reiterate such a conclusion in treaty form by only a subset of ECT contracting parties.

3.2.2. Inter se *modification agreements*

A different problem arises for *inter se* agreements that actually do modify the law (which, according to several investment tribunals, includes the EU Treaties). For these agreements, it is necessary to consider whether the conditions in Article 41(1)(b) are met.

3.2.2.1. Inter se *agreement must not be prohibited*. The first of these conditions is that an *inter se* agreement must not be prohibited by the multilateral treaty. In this context, it is necessary to consider the implications of Article 16(2) of the ECT, which states that:

> Where two or more Contracting Parties have entered into … a subsequent international agreement, whose terms … concern the subject matter of Part III or V of this Treaty, … (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment.

There are two different ways in which Article 16(2) can require treaty interpreters to 'construe' a subsequent agreement so as to ensure that it does not derogate from an ECT provision granting more favourable treatment to investors or investments. First, it might be possible to interpret the rules in the subsequent agreement in such a

61 *Green Power Partners*, *ibid*, para 469.

manner ('construe' meaning 'interpret').[62] But this might not be possible, for example, where there is a 'conflict' between the two agreements. This is what *Vattenfall v Germany* concluded when it said that Article 16(2) was a 'conflict rule' that prioritises the ECT over less favourable subsequent agreements (the Treaty on the Functioning of the European Union, 'TFEU', in that case).[63] In such cases, Article 16(2) requires these tribunals to *disapply* these agreements, to the extent that they are less favourable ('construe' in the more potent sense of 'understand').[64] But it does not prohibit them. Article 16(2) does not therefore have the effect specified in Article 41(1)(b) of expressly prohibiting subsequent *inter se* agreements, even where they accord less favourable treatment than the ECT. And nor does any other provision in the ECT.[65]

Importantly, the opening clause of Article 41(1)(b) does not cover *implicit* prohibitions. This is not, however, contrary to what is sometimes said,[66] because this is evidenced in the drafting history, within the International Law Commission, of what became Article 41(1)(b). It is true that the members of the International Law Commission agreed to reject the phrase 'expressly or impliedly', which might be thought evidence that they wanted to exclude the application of Article 41 to implicit prohibitions. However, a closer look at the record of the relevant meeting reveals that the members of the Commission had quite opposite reasons for wanting to delete the reference to implicit prohibitions. Some members (the majority) were of the view that the word 'prohibited' had to be limited to express prohibitions, because implied prohibitions were provided for in the two subparagraphs (i) and (ii), but

62 In *SoIEs Badajoz GmbH v Spain*, ICSID Case No ARB/15/38, Decision on Annulment 16 March 2022, para 122, Spain unsuccessfully argued before the Annulment Committee that '[a]rticle 16 of the ECT is not a conflict resolution rule but an interpretative precept'.

63 *Vattenfall AB et al v Germany*, ICSID Case No ARB/12/12, Decision on the *Achmea* Issue, 31 August 2018, paras 222-229. This reasoning has been followed by subsequent awards. Specifically concerning the Treaty on the Functioning of the EU (TFEU) as a subsequent *inter se* agreement, some tribunals have found that the TFEU does not concern the same subject matter (eg, *ESPF*, above at n 48, para 308).

64 We are grateful to Federico Ortino for suggesting this alternative meaning for 'construe'. An analogy can be drawn to Article XX of GATT 1994, which states that 'nothing in this Agreement shall be construed to prevent the adoption or enforcement … of measures: … necessary to protect public morals … '. This language has always been interpreted as meaning that a measure that is described in Article XX is permitted, notwithstanding the fact that it might also violate a GATT 1994 obligation. Functionally, this means that Article XX empowers WTO tribunals to disapply otherwise applicable obligations when its specific conditions are met; it does not however require them to nullify those obligations (nor would this be possible).

65 See Energy Charter Secretariat, Letter to European Parliament in Response to Resolution 2022/2934, SG/23/E/0047 (13 February 2023), available at https://www.energycharter.org/fileadmin/DocumentsMedia/News/0047-SG-13022023-EP_President.pdf, in which the Energy Charter Secretariat gave several reasons why the EU interpretation agreement would not be permitted by Article 41(1) VCLT. One was that such an *inter se* agreement 'could be considered as a reservation (which is not allowed by Article 46 ECT)'. This is wrong, because a reservation must be made, at the latest, at the time of ratifying, accepting, approving or acceding to a treaty (Article 2(1)(d) VCLT), and a subsequent *inter se* agreement could therefore not be a reservation, prohibited or otherwise. It also said that reliance on Article 41 was not possible because the EU is not a party to the Vienna Convention. This overlooks the customary international law status of Article 41(1) VCLT.

66 See, eg, Michael De Boeck, *EU Law and International Investment Arbitration*, above at n 56, at 89.

others (a small minority) thought that the phrase could be deleted because it was superfluous.[67] That said, the arguments of the majority are persuasive, and generally accepted by writers on the topic.[68]

3.2.2.2. Inter se *agreement must not affect rights of other treaty parties*. On this basis, the next question is whether, as per Article 41(1)(b)(i), an *inter se* agreement excluding the application of the ECT or just its sunset clause would 'affect the enjoyment by the other parties of their rights under the [ECT] or the performance of their obligations'. It is difficult to see that this would be the case.[69] The investors and investments of other ECT contracting parties remain unaffected. This means that, for example, Japanese investors and investments in an EU member state would still be protected. More difficult is the next condition, set out in Article 41(1)(b)(ii), which prohibits *inter se* agreements that 'relate to a provision, derogation from which would be contrary to the execution of the object and purpose of the [ECT] as a whole'. This requires a consideration of the object and purpose of the ECT.

3.2.2.3. Inter se *agreement must not undermine object and purpose of the treaty*. The starting point in identifying these is Article 2, entitled 'Purpose of the Treaty', according to which '[t]his Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter'. That Charter states, inter alia, that '[the signatories] undertake to pursue the objectives of creating a broader European energy market and enhancing the efficient functioning of the global energy market by joint or coordinated action under the Charter in the following fields: … promotion and protection of investments'.[70] Later, the signatories also 'affirm that it is important for the signatory States to negotiate and ratify legally binding agreements on promotion and protection of investments which ensure a high level of legal security'.[71] These references have occasionally been cited as context when interpreting ECT provisions, mainly to preclude a retrospective application of the denial of benefits carve out in Article 17(1) of the ECT,[72] but so far no tribunal has concluded

67 ILC, Summary Records of the Sixteenth Session (765th meeting), in *Yearbook of the International Law Commission 1964*, Vol I, UN Doc A/CN.4/SER.A/1964, at 271-274. Those speaking in favour of the first interpretation were Verdross (para 81), Rosenne (para 82), Lachs (para 93). Those against were Yasseen (para 86), and Bartoš (para 99). Others were indeterminate.

68 De Boeck, above at n 58, at 89, with further references; Anne Rigaux et al, 'Article 41' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 986, at 996.

69 See also *Greentech*, above at n 45, para 354.

70 European Energy Charter, Title I, preamble.

71 European Energy Charter, Title II, para 4.

72 See Hobér, above at n 2, at 143.

from these provisions alone that the object and purpose of the ECT includes the protection of investors and investments, including the investor's right to enforce these protections by means of investor-state dispute settlement.[73]

This is not however determinative, because the object and purpose of a treaty can be identified not only in its stated objectives but also in its operative provisions,[74] including, in the case of the ECT, those relating to enforceable investor protection. But here one needs to exercise care not to treat every derogation from a provision in a multilateral treaty as contrary to its object and purpose. There must be some level of abstractable principle. As to this, the argument has been made that, just as the treaty rights of other treaty parties are protected by Article 41(1)(b)(i), it makes sense to protect the treaty rights of individuals benefitting from the treaty under Article 41(1)(b)(ii).[75] That said, it might be questioned whether this means that there is no room for reducing any investor protections without contradicting the object and purpose of the agreement. In this respect, it is relevant that the sunset clause did not feature in the draft ECT text circulated in 1991,[76] and was only included in a later draft upon Japan's express request.[77] The sunset clause does not therefore appear to have been fundamental to the ECT's object and purpose, except perhaps to Japan. Against this, however, it might be suggested that, by virtue of both the most favoured nation obligation in Article 10(1) and Article 16(2), the ECT enshrines an abstractable principle that investors and investments are to be accorded the most favourable treatment available, even when that treatment is contained in another agreement entirely. If this is accepted, then an *inter se* agreement derogating from the sunset clause, and hence the ECT's extended substantive and dispute settlement protections,[78] would be incompatible with the effective execution of the object and purpose of the ECT as a whole.

73 *Green Power*, above at n 58, at paras 402-403, was careful to say that these objectives were 'too unspecific' to conclude that the object and purpose of the ECT would be undermined by the non-application of investor-state dispute settlement to intra-EU investment disputes. This does not necessarily mean that outside of this context an *inter se* agreement limiting investor state protections would not contradict the ECT's object and purpose. The tribunal specifically noted a reference in the preamble of the European Energy Charter to the completion of the EU's internal energy market, even if its reasoning was based on a lack of overall specificity rather than the existence of a countervailing objective.

74 Isabelle Buffard and Karl Zemanek, 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 *Austrian Review of International and European Law* 311, at 343.

75 Maja Smrkolj, 'The Use of the "Disconnection Clause" in International Treaties' (2008), at 10 available at https://ssrn.com/abstract=1133002; also, citing Smrkolj, Christian Tietje, 'The Applicability of the Energy Charter Treaty in ICSID Arbitration of EU Nationals vs EU Member States' in Christian Tietje and Gerhard Kraft (eds), *Beiträge zum Transnationalen Wirtschaftsrecht*, No 78, at 12.

76 European Energy Charter, Draft Treaty, Basic Protocol to the European Energy Charter (20 August 1991), Article 42.

77 European Energy Charter, Basic Agreement, Doc 4/92 BA 6 (21 January 1992), Art 43, para 3 and Note, at 73.

78 On investor state dispute settlement as an essential element of the ECT, see *Silver Ridge*, above at n 45, para 229.

3.3. Conclusion

The following summary conclusions can be reached about an *inter se* agreement purporting to exclude the application of the sunset clause in Article 47(3) as between the parties to that agreement. First, an *inter se* agreement that merely interprets the ECT is unlikely to amount to a modification of the ECT within the meaning of Article 41 of the Vienna Convention. Such an interpretation agreement should rather be adopted by all of the ECT contracting parties as required by Article 31(3)(a) of the Vienna Convention. Second, a potential *inter se* agreement that does modify the ECT in this way would neither be permitted nor prohibited by the ECT, but while it would not affect the rights of third parties contrary to Article 41(1)(b)(i) of the Vienna Convention, it would be likely to derogate from provisions – namely the sunset clause and other substantive provisions – that would result in it being incompatible with the effective execution of the object and purpose of the treaty as a whole contrary to Article 41(1)(b)(ii).

4. WITHDRAWAL FROM THE ECT DUE TO FUNDAMENTAL CHANGE OF CIRCUMSTANCE

4.1. Introduction

If the foregoing analysis is correct, then it is not possible for ECT contracting parties to exclude the application of the sunset clause by an *inter se* modifying agreement.[79] In any case, even if this were possible, the application of the sunset clause would remain unaffected with respect to existing investors and investments of non-participating ECT contracting parties.

The European Commission's non-paper does not consider whether there is any way an ECT contracting party can withdraw from the ECT in a way that excludes the application of the sunset clause to such non-participating contracting parties other than via an express agreement with them, but one possibility might be to withdraw from the ECT, including its sunset clause, on the basis that there has been a fundamental change of circumstance, in accordance with the doctrine of *rebus sic stantibus* codified in Article 62 of the Vienna Convention. The argument would be that the need to drastically and urgently abandon fossil fuels in order to combat the worst effects of climate change represents a fundamental change of circumstance that was not foreseen at the time the ECT was concluded in 1994 and that now makes it

79 The Energy Charter Secretariat, above at n 63, is wrong to doubt that a *former* contracting party (Italy) is not able to conclude an *inter se* agreement modifying its obligations under the ECT, to which it is no longer a party. It is true that Article 41 VCLT does not apply. However, the matter is regulated by Article 30(4)(b) VCLT, according to which, as between a party to both the ECT and the *inter se* agreement (eg Germany) and a party to only the *inter se* agreement (Italy), the *inter se* agreement prevails, provided that the *inter se* agreement relates to the subject matter of the ECT.

unduly burdensome to continue to protect fossil fuel investors and investments for twenty years after withdrawal from the ECT.

As noted, this is a difficult argument to make. The invocation of this doctrine has seldom been successful,[80] and the *rebus sic stantibus* is, for historical reasons, treated with great scepticism by international lawyers.[81] Nonetheless, the criticisms of the ECT, and the recent notifications of withdrawal from the ECT, are implicitly based on a claim that circumstances have indeed changed, and radically so. It is therefore worth taking seriously the question whether the strict conditions that attach to the doctrine under the Vienna Convention can be said to have been met in this case.[82]

Article 62(1) of the Vienna Convention reads:

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
>
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. [83]

This can be distilled into the following cumulative conditions: there must be (a) a circumstance that was an essential basis for the conclusion of the treaty, that (b) has now fundamentally changed in a way that (c) was not foreseen at the time of conclusion of the treaty, and (d) the change in circumstance must now make it unduly burdensome for a party to comply with its treaty obligations. In the present case, there is an additional complication, which is that the relevant 'circumstance' at issue itself involved a forecast about the future which then turned out to be incorrect. These conditions will now be discussed in turn, first in terms of what was known and foreseen in 1994, when the ECT was concluded, and what is known now; and, secondly in terms of what these different states of knowledge meant for the conclusion of the ECT and for the continuing performance of its obligations.

80 Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing 2005), at 178.

81 Robert Kolb, 'The Construction of the *Rebus Sic Stantibus* Clause in International Law: Exception, Rule, or Remote Spectator?' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (OUP 2020).

82 The Energy Charter Secretariat itself published a news item, 'Sunset Clause (Article 47 of the ECT) in relation to Article 62 of the Vienna Convention on the Law of Treaties (VCLT)', (Energy Charter News, 3 November 2022), available at https://www.energycharter.org/media/news/article/sunset-clause-article-47-of-the-ect-in-relation-to-article-62-of-the-vienna-convention-on-the-law/ reminding ECT contracting parties of the exceptional character of a potential invocation of a fundamental change of circumstance (Article 62 of the Vienna Convention) as a ground for withdrawing from or terminating the treaty and especially referencing the sunset clause at Article 47(3) ECT.

83 See eg György Haraszti, Treaties and the Fundamental Change of Circumstances (1975) 46-III Collected Courses of the Hague Academy of International Law, at 42; Fitzmaurice and Elias, above at n 78, at 175.

4.2. Changed Circumstance

It goes without saying that climate change was a well-known risk in 1994. The IPCC issued its first report in 1990,[84] which was the basis for the 1992 UN Framework Convention on Climate Change ('UNFCCC'),[85] and followed this up with a second report in 1992.[86] What was uncertain, however, was the extent of the risk, and the measures that would need to be adopted in order to combat this risk.

Forecasts of the extent of future climate change can be seen in the 1990 IPCC report, which offered a range of scenarios for greenhouse gas emissions in 2025, depending on government policy measures that might be undertaken.[87] The figures for the different scenarios, in CO^2 ppm, were as follows: Alternative Accelerated Policies (381 ppm), Accelerated Policies (393 ppm), Control Policies (398 ppm), 2060 Low Emissions (398 ppm), and 2030 High Emissions (437 ppm). This last scenario was based on 'a world in which few or no steps are taken to reduce emissions in response to concerns about greenhouse warming'.[88]

This forecast turned out to be unduly optimistic, because even though significant steps were taken to reduce emissions, including steps beyond those foreseen in the 1992 UNFCCC, the current concentration, in 2023, is 419 ppm,[89] and will almost certainly reach 424 ppm in 2025. Emissions are also 54% higher than in 1990, and in particular fossil fuel emissions are 65% higher than in 1990.[90]

But along with an underestimate of the degree of the problem, the IPCC, and the 1992 UNFCCC, underestimated what needed to be done. In particular, even though the IPCC already identified energy and in particular fossil fuels as the single largest anthropogenic source of radiative forcing,[91] it thought that climate change could be effectively managed by several options, of which a reduction in the use of fossil fuels was only one. The IPCC's 1990 report, in the section on 'energy and industry', said the following (under the heading 'response strategies'):

> Climate change offers an unprecedented challenge to energy policy development. Many uncertainties remain about both the impacts of climate change itself and our response to it. It is very important that countries begin the task of developing flexible and phased

84 IPCC, First Assessment Report, Climate Change: The IPCC Response Strategies (October 1990).

85 United Nations Framework Convention on Climate Change, signed 9 May 1992, in force 21 March 1994.

86 IPCC, Climate Change: The IPCC 1990 and 1992 Assessments (June 1992).

87 IPCC First Assessment Report, above at n 82, at 13-15.

88 *Ibid*, 15.

89 NASA, Vital Signs – Carbon Dioxide (February 2023), available at https://climate.nasa.gov/vital-signs/carbon-dioxide/.

90 The 2022 IPCC Sixth Assessment Report, above at n 14, based on 2019 figures, found that global net anthropogenic GHG emissions were 59 (±6.6) GtCO2-eq (at 57-59), which is 54% higher than in 1990 (at 228). The figure for fossil fuel combustion and industrial processes (CO2-FFI) is even more dramatic, at 38 (± 3) GtCO2-eq (at 619), which is 65% higher than in 1990 (at 230). It is also notable that fossil fuel combustion and industrial processes now account for almost two-thirds of total emissions (at 619).

91 IPCC First Assessment Report, above at n 82, at xxix.

> response strategies. The underlying theme of any strategy must be economic efficiency – achieving the maximum benefit at minimum cost. Strategies that focus only on one group of emission sources, one type of abatement option, or one particular greenhouse gas will not achieve this.[92]

The report also suggested several ways to reduce greenhouse gas emissions from energy systems. It identified 'the most relevant categories of options' as follows:

- efficiency improvements and conservation in energy supply, conversion, and end use;
- fuel substitution by energy sources that have lower or no greenhouse gas emissions;
- reduction of greenhouse gas emissions by removal, recirculation, or fixation; and
- management and behavioural changes (e.g. increased work in homes through information technology) and structural changes (e.g. modal shift in transport).[93]

It is against this background that one can understand the 'circumstance' that underpinned the ECT, which was that promoting the production, trade, and use of fossil fuels did not undermine the goals of the UNFCCC. On the contrary, as can be seen from the reference to the UNFCCC in the ECT's preamble, it was thought that the ECT would contribute to these goals by promoting more efficient techniques in the hydrocarbon life cycle.

This circumstance has now radically changed. The 2015 Paris Agreement has set an objective of keeping temperatures to well below 2°C (and ideally 1.5°C) above pre-industrial levels, and it is now clear that the only way to do this is to urgently and drastically abandon the use of fossil fuels, ideally achieving net zero emissions by the early 2050s. The 2022 IPCC Report explains that:

> If the annual CO_2 emissions between 2020–2030 stayed, on average, at the same level as 2019, the resulting cumulative emissions would almost exhaust the remaining carbon budget for 1.5°C (50%), and deplete more than a third of the remaining carbon budget for 2°C (67%). Estimates of future CO_2 emissions from existing fossil fuel infrastructures without additional abatement already exceed the remaining carbon budget for limiting warming to 1.5°C (50%) (*high confidence*). Projected cumulative future CO_2 emissions over the lifetime of existing and planned fossil fuel infrastructure, if historical operating patterns are maintained and without additional abatement, are approximately equal to the remaining carbon budget for limiting warming to 2°C with a likelihood of 83% (*high confidence*).[94]

Further, the 2022 IPCC Report explains that this will result in 'stranded assets', which are in-ground fossil resources and human-made capital assets (eg power plants and cars) which 'suffer from unanticipated or premature write-offs, downward revaluations

92 *Ibid*, at 68-9.

93 *Ibid*, at p xxxv.

94 IPCC, Synthesis Report of the IPCC Sixth Assessment Report, Summary for Policymakers (March 2023), at 21.

or conversion to liabilities.'[95] These stranded assets are significant both in terms of quantity and value. Welsby et al, estimate the proportion of current reserves that will need to remain in the ground:

> Unextractable oil, fossil methane gas and coal reserves are estimated as the percentage of the 2018 reserve base that is not extracted to achieve a 50% probability of keeping the global temperature increase to 1.5°C. We estimate this to be 58% for oil, 56% for fossil methane gas and 89% for coal in 2050. This means that very high shares of reserves considered economic today would not be extracted under a global 1.5°C target.[96]

In terms of value, the IPCC quantifies the consequences for stranded assets, stating that '[p]ractically all long-lived technologies and investments that cannot be adapted to low-carbon and zero-emission modes could face stranding under climate policy – depending on their current age and expected lifetimes.'[97] It surveys various studies, estimating the value of stranded assets to be in USD trillions.[98]

4.3. The 'Unforeseen' Nature of the Change

In international law, and for reasons of treaty stability, changed circumstances *per se* do not amount to a *rebus sic stantibus*. That change – in this case, the replacement of the assumption that fossil fuels could be relied upon for the foreseeable future with a recognition that fossil fuels need to be phased out as soon as possible, even resulting in stranded fossil fuel assets – must also have been 'unforeseen' at the time the treaty was concluded.

This raises the question of what it means for an event to be 'unforeseen'. The leading case on this issue is *Gabčíkovo-Nagymaros*, in which the International Court of Justice ('ICJ') rejected Hungary's claim to be entitled to terminate a treaty to construct a dam with Slovakia on the grounds that there had been an unforeseen fundamental change of circumstance concerning certain environmental issues. The ICJ said, famously, that it 'does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen'.[99]

But this is actually quite a different test. For an event to be *unforeseen* implies a degree of probability somewhere between 0 and 1; for an event to be *completely unforeseen* implies a probability of 0. To put this into relief, the ICJ's test requires that the

95 IPCC Sixth Assessment Report, above at n 88, Box TS.8, at 90.

96 Dan Welsby et al, 'Unextractable fossil fuels in a 1.5°C world' (2021) 597 *Nature* 230, at 231. They add that '[t]he bleak picture painted by our scenarios for the global fossil fuel industry is very probably an underestimate of what is required and, as a result, production would need to be curtailed even faster. This is because our scenarios use a carbon budget associated with a 50% probability of limiting warming to 1.5°C, which does not consider uncertainties around, for example, Earth system feedbacks; therefore, to ensure more certainty of stabilizing at this temperature, more carbon needs to stay in the ground.' *Ibid*, at 234.

97 IPCC Sixth Assessment Report, above at n 88, Box TS.8, at 90.

98 *ibid*, at 1582.

99 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),* Judgment, ICJ Reports 1997, p 7, para 104.

envisaged probability of an event occurring is zero, which is less than the FBI accords to the probability that the world will be visited by flying saucers,[100] or that NASA accords to the likelihood of extra-terrestrial life.[101]

Since *Gabčíkovo-Nagymaros*, very few authors even consider that 'unforeseen' might still involve questions of probability. One exception is Christina Binder, who concurs with an earlier author, Hermann Pott, that the test should be what is 'possible but improbable'.[102] But this was not so uncommon prior to *Gabčíkovo-Nagymaros*. For example, Gerald Fitzmaurice's Second Report on the Law of Treaties contains the following draft text for what would become Article 62:

> The change must not be one that was foreseen by the parties, or be such as they might, by the exercise of reasonable foresight, have anticipated. It must not, therefore, either expressly or by necessary implication, be a change which is provided for in the treaty, or in any other relevant agreement between the parties, for in that case the treaty or agreement would prevail, and the principle *rebus* would, as such, be inapplicable.[103]

This is instructive on two counts. First, Fitzmaurice treats as 'foreseen' any event that was regulated in the treaty at issue. In this respect, the term 'foreseen' is not about probability, but about ensuring that the *rebus sic stantibus* rule in the Vienna Convention remains residual. But this drafting also contains an objective probability test, which for Fitzmaurice was what *might* have been foreseen by the exercise of reasonable foresight. Even if Fitzmaurice's test of 'reasonableness' is too generous, as might well be thought today, what is important is that he acknowledges that *rebus sic stantibus* should not be reserved for events that are completely unforeseen, which renders the test of virtually no practical use at all.

Based on the foregoing analysis, it is possible to draw some tentative conclusions about whether the 'change' in circumstance at the time of the conclusion of the 1994 ECT was 'unforeseen'. It is reasonable to assume that governments at the time would have thought that if the indicated measures were adopted – including natural and man-made abatement measures such as enhancing carbon sinks and developing efficient carbon capture and sequestration technologies – they could have continued to rely on fossil fuels for the foreseeable future; this is because results, as projected, would be somewhere near the better-case scenarios. In fact, however, even though those measures were adopted, as well as later, more effective measures, the results are much closer to the very worst – case scenario.

100 Williams et al, 'US Intelligence Community Releases Long-Awaited UFO Report' (CNN Politics, 25 June 2021), available at https://edition.cnn.com/2021/06/25/politics/ufo-report-pentagon-odni/index.html.

101 NASA, Search for Extraterrestrial Intelligence (SETI) Institute, 'About', available at https://www.seti.org/about.

102 Christina Binder, *Die Grenzen der Vertragstreue im Völkerrecht* (Springer 2013), at 140, cites and concurs with Hermann Pott, *Clausula Rebus Sic Stantibus* (Peter Lang 1992), at 94, though without referring in this context to *Gabčíkovo-Nagymaros*, which had by then been decided.

103 ILC, Second Report on the Law of Treaties by Gerald Fitzmaurice, UN Doc A/CN.4/107, contained in *Yearbook of the International Law Commission 1957*, Vol II, UN Doc A/CN.4/SER.A/1957/Add.1, at 33.

From this it follows that, while the ECT contracting parties could (and presumably did) foresee that reliance on fossil fuels would have progressively decreased, they did not (and arguably could not) foresee that such a reduction would have been so urgent and drastic in 2023 as to necessitate 'turning fossil fuel reserves into stranded resources and existing investments into stranded assets'.[104] Put differently, had they foreseen this in 1994, and considering that fossil fuels investments are inherently long term or other they are not profitable, they would, with a high degree of probability, foregone negotiating such a treaty and perhaps negotiated a different treaty (including perhaps a treaty without a sunset clause). And that should be sufficient to demonstrate that the current circumstance, compared to the assumptions current at the time, was an 'unforeseen' change to an essential circumstance within the meaning of Article 62 of the Vienna Convention.

4.4. Consequences for the ECT

Not every unforeseen change in circumstance counts. Rather, what needs to be shown is both that the original circumstance was an essential basis for the treaty, and that the changed circumstance has radically transformed the extent of obligations still to be performed under the treaty. As to the first point, the history of the ECT, as well as its core purpose, described above, show that the very *raison d'être* of the treaty was to promote production and trade in fossil fuels, albeit in as efficient a manner as possible. This purpose, in turn, was based on the assumption that such activity could continue for the foreseeable future, and, based on the sunset clause, certainly for at least twenty years after any contracting party might leave the ECT. That assumption is quite clearly no longer valid, both in terms of the measures that now need urgently to be adopted, and the costs of performing the treaty in order to be able to adopt those measures. Those costs have now been calculated by Tienhaara et al in terms of potential claims under the ECT as potentially amounting to $2.8bn.[105]

The scale and value of these claims, it is suggested, arguably 'radically … transform the extent of obligations still to be performed under the treaty' within the meaning of Article 62 of the Vienna Convention[106] or, to use the language of the ICJ in *Fisheries Jurisdiction*, have 'increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken'.[107] Indeed, the significance of the effect of the change in circumstances can be demonstrated by reference to the fact that it is the prime reason that several ECT contracting states are now withdrawing or considering withdrawing from the ECT.

104 Kyra Bos and Joyeeta Gupta, above at n 9.

105 Kyla Tienhaara et al, 'Investor-State Dispute Settlement: Obstructing a Just Energy Transition', above at n 35, at 9.

106 This does not, of course, mean that it is impossible for the ECT contracting parties to perform their obligations. That would be a question to be treated under Article 61 VCLT, which permits the termination of a treaty in cases of supervening impossibility of performance.

107 *Fisheries Jurisdiction Case (UK v Iceland)*, Jurisdiction of the Court, Judgment, ICJ Reports 1973, p 3, para 43.

4.5. Conclusion on Fundamental Change of Circumstance

The ECT was concluded on the basis of an assumption that has fundamentally changed, namely, that fossil fuels could continue to be used for the foreseeable future. This turned out not to be true. Not only were the measures indicated at the time less effective than anticipated, but those measures that were adopted have not been sufficient to ward off a serious climate emergency. The result is that ECT contracting parties, like other states, now need to adopt urgent and drastic measures, focused on the stranding of fossil fuel assets, that risk being extremely costly, rendering performance of their ECT investment obligations radically different from what they expected at the time these obligations were undertaken. To put it another way, had the ECT contracting parties known in 1994 what they know now, it is doubtful that they would have concluded the ECT in its current form (including the sunset clause). On this basis, the idea that an ECT contracting party might be able to withdraw from the ECT on the grounds of *rebus sic stantibus* is one that should be taken seriously.

5. SURVIVING RIGHTS AND OBLIGATIONS UNDER ARTICLE 70 OF THE VIENNA CONVENTION

There is one final point to consider, which concerns the consequences of withdrawing from the ECT under Article 62 of the Vienna Convention. In such an event, Article 70 (1)(b) of the Vienna Convention will apply to protect rights (as well as obligations and legal situations) that vested prior to withdrawal from the treaty.

Article 70(1)(b) states as follows:

> Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: … (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.[108]

Contrary to what is sometimes thought,[109] the rights to which Article 70(1)(b) refers are not those of individual investors, but rather those of the treaty parties.[110] In the case at

108 Article 70(2) continues: 'If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect'.

109 Eg *Oostergetel and Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction 30 April 2010, para 90.

110 Karsten Nowrot, 'Termination and Renegotiation of International Investment Agreements' in Steffen Hindelang and Markus Krajewski, *Shifting Paradigms in International Investment Law* (OUP 2016), at 252, referring to ILC, Commentary to Draft Article 66, Report of the International Law Commission on the Work of its Eighteenth Session – Law of Treaties, UN Doc A/6309/Rev.1, in *Yearbook of the International Law Commission 1966*, Vol II, UN Doc. A/CN.4/SER.A/1966/Add.1, at 265 para 3.

hand, these rights potentially include the ECT contracting parties' rights to the protection of their investors and investments, and their procedural rights to enforce these substantive rights by means of state-to-state dispute settlement under Article 27 of the ECT.[111] However, Article 70(1)(b) does not protect all rights set out in a treaty; it only protects rights that are 'created through the execution of the treaty'. This second, more limited, category of rights, depends upon the occurrence of an event that is either described in the treaty or that generates consequences described in the treaty. Examples include the creation of property rights[112] and financial obligations incurred under a treaty prior to its withdrawal. Relevantly, they also include rights generated by a breach of an obligation owed to a party while the treaty was still in force. As McNair put it in *Ambatelios*, 'such claims acquire an existence independent of the treaty whose breach gave rise to them.'[113]

On this basis, it seems clear that any breach of the ECT by a withdrawing party prior to its withdrawal creates a right in the injured contracting party that is protected by Article 70(1)(b) of the Vienna Convention. But this does not mean that the injured contracting party is then able to commence dispute settlement proceedings under Article 27. While Article 27 provides for a right to dispute settlement, that right does not acquire an existence independent of the ECT itself until it is triggered. Thus, it would be necessary for the injured contracting party to commence dispute settlement proceedings in respect of the alleged breach prior to the withdrawal from the agreement under Article 62 coming into effect.[114] This is of course independent of the possibility of proceedings in another forum with a current jurisdiction, for example, under an arbitration agreement.

111 A 'right' under Article 70 can arguably be understood in a less strict way than in legal theory, to include the power, in Hohfeldian terms, to initiate dispute settlement. See, with reference to an investor's power to initiate investor-state dispute settlement, Bart Smits Duijzentkunst, *The Concept of Rights in International Law*, unpublished PhD, University of Cambridge, 2015, at 158. As noted above, at n 7, the Agreement in Principle would have stated that investor-state and state-state dispute settlement 'shall not apply' as between EU Member States. From the EU's perspective, this wording allows for an interpretation that these norms never applied as between the EU Member States or their investors.

112 *Case Concerning the Northern Cameroons (Cameroon v UK)*, Preliminary Objections, Judgment of 2 December 1963: ICJ Reports 1963, p 15, at 34.

113 *Ambatelios Case (Greece v UK)*, Preliminary Objection, Judgment of 1 July 1952, ICJ Reports 1952, Dissenting Opinion of President McNair, at 63; *Rainbow Warrior Arbitration Award* (1990) XX RIAA 217, at 266. Generally, see Stephan Wittich, 'Article 70: Consequences of the Termination of a Treaty' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018), at 1293.

114 There is an exception, perhaps useful in the present context, concerning disputes about the validity of a purported withdrawal from the ECT. Such disputes can still be brought under Article 27, either on the basis that the 'legal situation' includes a procedure by which the same legal situation can be determined, or on the basis that dispute settlement clauses can be severed, as with arbitration agreements, when the validity of the underlying treaty is at issue. See Hervé Ascensio, 'Article 70' in Corten and Klein, above at n 66, at 1609.

6. CONCLUSION

This article has considered several legal aspects of a serious problem facing ECT contracting parties seeking to withdraw from the ECT so that they can adopt measures to combat climate change without being subject to the sunset clause in Article 47(3) of the ECT, which protects investments made prior to the date of withdrawal for twenty years after that date.

The article began by recounting the efforts of ECT contracting parties from 2018 to 2022 to modernise the ECT, in part so as to mitigate the risk of costly compensation claims arising out of climate change measures. It then described the failure of these efforts, the withdrawals of France, Germany and Poland (following Italy's example in 2016), indications by other some other EU Member States and the EU that they are considering withdrawal, as well as suggestions that the UK should follow suit. It then considered several ways that such contracting parties might seek to exclude the application of the sunset clause. One method is to amend the ECT; another is by way of an *inter se* agreement modifying the ECT to exclude the application of the sunset clause as between the parties to that agreement. Amendment is legally possible, but it is at present politically difficult. A *inter se* modification agreement derogating from the sunset clause, on the other hand, would almost certainly be contrary to the object and purpose of the ECT, and therefore be prohibited by Article 41(1)(b)(ii) of the Vienna Convention. It also explained why an interpretation agreement cannot be concluded *inter se*, because that would subvert the unanimity rule for such agreements set out in Article 31(3)(a) of the Vienna Convention.

Against this background, the article went on to consider another possibility, namely whether ECT contracting parties might be entitled to withdraw from the ECT, including its sunset clause, on the basis of the *rebus sic stantibus* doctrine. This doctrine, codified in Article 62 of the Vienna Convention, permits a party to withdraw from an agreement when there has been an unforeseen fundamental change of a circumstance that was an essential basis of the treaty, and that change has radically transformed the extent of the obligations to be performed under the treaty. This is well known to be a difficult test to meet, but it was suggested that, in fact, it may well be met in the present case. This is in particular because of the special nature of the ECT, which, unlike other bilateral investment treaties, was concluded specifically to promote and protect investments in fossil fuels.

The circumstances in which the ECT was concluded in 1994 are quite different from those now. Then, it was assumed that reliance on fossil fuels was a sustainable option for the foreseeable future, and while climate change was well known, what was not known in 1994 was, as now warned by the IPCC and others, that the only way to meet the core Paris Agreement objective of holding global average temperatures to well below 2°C above pre-industrial levels (and ideally no more than 1.5°C) is to leave significant proportions of current reserves of fossil fuels untapped. Moreover, the cost of stranding these and other fossil fuel related assets is likely to lead to compensation claims

worth billions of dollars, a result that is radically different from that which was anticipated in 1994 and that will radically transform the extent of the obligations to be performed under the treaty.

The overall conclusion, then, is that a withdrawal on this basis is the only method available to ECT contracting parties wishing to leave the ECT, for climate change reasons, without being bound by its sunset clause. It remains to be seen whether ECT contracting parties withdrawing from the ECT are prepared to make this case.

DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).