

WILL THE EUROPEAN UNION TRULY ACHIEVE ITS DECARBONIZATION GOALS BY ABANDONING THE ENERGY CHARTER TREATY?

MAURICIO MOURGLIA*

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I. INTRODUCTION

With the Energy Charter Treaty (ECT) turning thirty years old, this product of Western Europe originally conceived to promote investments in the energy sector and especially fossil fuels after the fall of the U.S.S.R. seems to be reaching its final days. Or so is the intention of the European Union (E.U.), whose current agenda includes incentivizing the use of clean energy resources and phasing out fossil fuels investments. Indeed, after many years of discussions about modernizing the ECT to be aligned with the pressing environmental circumstances, the E.U. and its member states are now considering another approach: complete withdrawal from the ECT. In fact, some E.U. countries have already decided to individually withdraw from the treaty, making it more difficult to reach a modification with other contracting states.

* LL.M., New York University School of Law (2024). Hauser Global Scholar. Graduate Editor of the N.Y.U. Journal of International Law and Politics. LL.B., University of Montevideo, Uruguay (2018). This article traces ongoing events with the potential to impact future subject regulations. Conclusions are relevant as of May 2024, but the dynamic situation may alter their validity in the future. The views expressed herein are the author’s personal

What is at stake for Europe is the exposure to potential international liability vis-à-vis foreign investors in the fossil fuels sector, as a reaction to the measures European countries will undertake to accelerate decarbonization and achieve net-zero emissions by the target dates set in the Paris Agreement.

Nevertheless, the ECT may live for much longer than the E.U. expects. The treaty provides for a sunset clause that will protect existing energy investments for an additional twenty years,¹ and despite the E.U.'s efforts to limit its application, the future of the ECT is at least uncertain and will inevitably spark debate.

This article questions whether withdrawing from the ECT is a good solution to prevent regulatory chill and facilitate Europe's decarbonization goals.

II. THE EUROPEAN UNION'S STRATEGY TO ELIMINATE THE ECT

The ECT came into existence in 1994 as an agreement between the E.U., its Member States, the European Atomic Energy Community (Euratom), former U.S.S.R. countries,² and some countries in the West Balkans³ to promote and protect foreign investments in the energy sector after the conclusion of the Cold War. Now, the ECT has fifty contracting parties, including countries from other regions such as Asia⁴ and the Middle East.⁵ The treaty covers the protection of foreign investments, non-discriminatory treatment in energy trade, reliable energy transportation between member states, investor-state dispute settlement (ISDS) through arbitration, and the promotion of energy efficiency and environmental protection.⁶

1. Energy Charter Treaty art. 47(3), Dec. 17, 1994, 2080 U.N.T.S. 95 [hereinafter ECT].

2. *E.g.*, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Ukraine. *See Contracting Parties and Signatories of the Energy Charter Treaty*, ENERGY CHARTER TREATY [hereinafter *ECT Signatories*], <https://www.energychartertreaty.org/treaty/contracting-parties-and-signatories/> (last visited Feb. 21, 2024).

3. *E.g.*, Albania, Türkiye, and other countries now part of the E.U. such as Bulgaria, and Croatia. *See id.*

4. *E.g.*, Japan and Mongolia. *See id.*

5. *E.g.*, Jordan, Afghanistan, and Yemen. *See id.*

6. Monika Dulan, *Briefing: EU Withdrawal from the Energy Charter Treaty*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE 2 (Dec. 2023), <https://>

Originally, the ECT's main objective was to promote investments in fossil fuels⁷ (e.g., oil, natural gas, and coal) that were produced in the former Soviet countries by Western European multinationals,⁸ although it applies to any kind of energy resources, including renewables. In fact, as of December 1, 2023, there were 126 investment arbitration cases instituted under the ECT and fifty-eight percent of them related to renewable energy.⁹

The same reason that made the ECT so attractive for the E.U. in the nineties—the promotion of investments in hydrocarbons—is what makes it problematic today.

A. *The ECT: An Obstacle to Decarbonization*

In recent years, the ECT has faced widespread criticism from its European members due to concerns that it jeopardizes the decarbonization targets required to comply with the Paris Agreement¹⁰ and mitigate the increase of global warming.¹¹ The E.U. has found that the ECT is a significant barrier to addressing climate change,¹² including its goal of keeping temperatures below 2°C—and ideally below 1.5°C—above the pre-industrial levels, which, as reported, will only happen if states reach net-zero carbon emissions by 2050.¹³

In particular, the E.U. is concerned that the ISDS mechanism in the ECT—which grants foreign investors direct access to arbitration against member states—threatens the

[www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS_BRI\(2023\)754632_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2023/754632/EPRS_BRI(2023)754632_EN.pdf).

7. Tibus Morgandi & Lorand Bartels, *Exiting the Energy Charter Treaty Under the Law of Treaties*, 34 KING'S L. J. 145, 147 (2023).

8. *Id.* at 145.

9. Energy Charter Secretariat, *Statistics of ECT Cases (as of 1/11/2023)* 3, https://www.energychartertreaty.org/fileadmin/user_upload/All_statistics_-_1_December_2023.pdf [hereinafter *ECT Statistics*].

10. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, 3156 U.N.T.S. 79.

11. Nicholas Lawn & Isabel San Martin, *The End Is Near: The European Commission's Proposed Coordinated Withdrawal from the ECT*, KLUWER ARB. BLOG (July 24, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/07/24/the-end-is-near-the-european-commissions-proposed-coordinated-withdrawal-from-the-ect/>.

12. Morgandi & Bartels, *supra* note 7, at 146.

13. *Id.* at 162.

transition from fossil fuels to renewable energy resources.¹⁴ This is because member states plan to pass regulation ordering drastic disinvestment in hydrocarbon production and, hence, will be exposed to claims for stranded assets (i.e., infrastructure that will become obsolete before the end of its expected economic life because it can no longer be used) owned by foreign investors in the field.¹⁵ According to the E.U., the ECT's protections to energy investors cause regulatory chill, as states are prevented from taking action to mitigate the effects of climate change due to the potential threat of this multimillion-dollar arbitrations.¹⁶ Indeed, states' potential liability under the ECT is reportedly estimated to be \$2.8 billion.¹⁷ According to the E.U. member states, withdrawal is necessary to avoid this cost.

The E.U.'s motivation to withdraw also includes the need to prevent intra-E.U. investment claims, as most of the claims filed under the ECT have been launched by companies incorporated in E.U. countries against other E.U. member states.¹⁸ Per the European Court of Justice (ECJ), the ECT's arbitration provision is invalid in intra-E.U. disputes because it contravenes the principle of autonomy of European law.¹⁹ The European Commission's position now is that "the ECT has never, does not and will never apply" to "intra-E.U. relations."²⁰

14. Leonie Kijewski & Barbara Moens, *EU tries to stop energy treaty exit stampede*, POLITICO (Oct. 20, 2022), <https://www.politico.eu/article/eu-tries-to-stop-energy-treaty-exit-stampede/> (last visited Mar. 4, 2024).

15. Morgandi & Bartels, *supra* note 7, at 168–69.

16. *Id.* at 146.

17. Kyla Tienhaara et al., *Investor-State Dispute Settlement: Obstructing A Just Energy Transition*, 23 CLIMATE POLICY 1197, 1205 (2023), <https://www.tandfonline.com/doi/epdf/10.1080/14693062.2022.2153102?needAccess=true>. See also Morgandi & Bartels, *supra* note 7, at 165.

18. *ECT Statistics*, *supra* note 9, at 6.

19. See Case C-741/19, Republic of Moldova v. Komstroy LLC, ECLI:EU:C:2021:655 (Sept. 2, 2021) [hereinafter Komstroy]. See generally Case C-284/16, Slovak Republic v. Achmea BV, ECLI:EU:C:2018:158 (Mar. 6, 2018) [hereinafter Achmea] (holding that intra-E.U. investment claims under bilateral investment treaties are invalid because they contravene E.U. law).

20. European Commission, *Proposal for a Council Decision on the Withdrawal of the Union from the Energy Charter Treaty 3* (July 7, 2023) [hereinafter *Withdrawal Proposal*].

B. *Towards a solution? Amending the ECT or withdrawing from it*

In response to these criticisms, in 2018, the European Commission initiated discussions at the Energy Charter Conference to modernize the ECT to adapt it to the current environmental crisis, an endeavor that requires a unanimous vote by the ECT members.²¹ Those negotiations concluded with an “Agreement in Principle” between all parties in June 2022 to amend the treaty, which included limiting the protection standards and the scope of protected “investors” and “investments,” creating a mechanism for dismissal of frivolous claims, and recognizing the states’ right to regulate the industry based on environmental concerns.²² Likewise, it offered each state the option to exclude fossil fuels from the ECT’s scope, providing that (i) it would cease to apply to new fossil fuels investments from August 15, 2023 onwards;²³ and (ii) it would only protect existing investments for ten years after its entry into force or until December 31, 2040, whichever was earlier.²⁴

Although the European Commission supported the Agreement in Principle, it faced opposition of key member states in the E.U. Council—namely, Germany, France, the Netherlands, and Spain—who abstained to vote on it at a meeting held on November 18, 2022.²⁵ These countries claimed that the amendments did not go far enough to allow energy transition.²⁶ Unable to vote in favor of modernization in the Energy Charter Conference scheduled just four days later, the European Commission asked for an adjournment of that decision to the ECT member states.²⁷

Later, on November 24, 2022, the European Parliament also rejected supporting the reform and called “on the EU and Member States to organise a coordinated withdrawal from the ECT.”²⁸ It indicated that the ECT “is not aligned with the Paris

21. ECT, *supra* note 1, art. 36.

22. Lawn & San Martin, *supra* note 11.

23. See Agreement in Principle on the Modernisation of the Energy Charter Treaty, Annex NI, Section B (June 24, 2022).

24. See *id.* at Section C.

25. *Withdrawal Proposal*, *supra* note 20, at 2.

26. Jack Ballantyne, *ECT parties delay vote on treaty reform*, GLOB. ARB. REV. (Nov. 22, 2022), <https://globalarbitrationreview.com/article/ect-parties-delay-vote-treaty-reform>.

27. Morgandi & Bartels, *supra* note 7, at 149.

28. *Withdrawal Proposal*, *supra* note 20, at 2.

Agreement, the EU Climate Law or the objectives of the European Green Deal,” nor is in line with the E.U.’s objective to impose “the immediate prohibition of fossil fuel investors from suing contracting parties for pursuing policies to phase out fossil fuels, in line with their international commitments.”²⁹ In the meantime, some E.U. countries started withdrawing from the ECT (including France, Germany, and Poland,³⁰ later joined by Luxembourg,³¹ Slovenia,³² the ECT depositary Portugal,³³ and Spain³⁴) and others publicly announced their intention to withdraw.³⁵

29. European Parliament Resolution on the Outcome of the Modernisation of the Energy Charter Treaty (Nov. 24, 2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0421_EN.pdf.

30. *Written Notifications of Withdrawal from the Energy Charter Treaty*, ENERGY CHARTER (Mar. 22, 2023), <https://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/> (last visited Feb. 22, 2024) (including notifications of withdrawal by France on December 7, 2022, Germany on December 19, 2022, and Poland on December 28, 2022).

31. *Written Notification of Withdrawal from the Energy Charter Treaty*, ENERGY CHARTER (Aug. 30, 2023), <https://www.energycharter.org/media/news/article/written-notification-of-withdrawal-from-the-energy-charter-treaty/> (last visited Feb. 22, 2024) (including notification of withdrawal by Luxembourg on June 16, 2023).

32. *Written notification of withdrawal from the Energy Charter Treaty*, ENERGY CHARTER (Feb. 26, 2024), <https://www.energycharter.org/media/news/article/written-notification-of-withdrawal-from-the-energy-charter-treaty-1/> (last visited Mar. 4, 2024) (including notification of withdrawal by Slovenia on October 13, 2023).

33. *Written notification of withdrawal from the Energy Charter Treaty*, ENERGY CHARTER (Mar. 7, 2024), <https://www.energycharter.org/media/news/article/written-notification-of-withdrawal-from-the-energy-charter-treaty-2/> (last visited Mar. 10, 2024) (including notification of withdrawal by Portugal on Feb. 1, 2024).

34. *Written notification of withdrawal from the Energy Charter Treaty*, ENERGY CHARTER (May 17, 2024), <https://www.energycharter.org/media/news/article/written-notification-of-withdrawal-from-the-energy-charter-treaty-3/> (last visited May 24, 2024) (including notification of withdrawal by Spain on April 16, 2024).

35. This includes the Netherlands, Czech Republic, Belgium, Denmark, Ireland, and Austria. See Dulkan, *supra* note 6, at 2; and Jack Ballantyne, *European Commission formally proposes ECT withdrawal*, GLOB. ARB. REV. (July 7, 2023), <https://globalarbitrationreview.com/article/european-commission-formally-proposes-ect-withdrawal>. Outside the E.U., the United Kingdom has confirmed it will withdraw the ECT, invoking the lack of action to modernize the treaty and the urgency to reach net-zero emissions. See Department for Energy Security and Net Zero, *UK departs Energy Charter Treaty*, UK GOVERNMENT

In this context, the negotiation of a modernized ECT reached a deadlock, and the European Commission initiated a process to assess a coordinated withdrawal in conjunction with Euratom and the E.U. member states. This process concluded on July 7, 2023, with a written proposal sent to the European Council to withdraw from the treaty.³⁶ Due to the lack of consensus between E.U. countries, this proposal has not had full support either.³⁷

As of May 2024, the European Commission has now issued a new proposal for a Council decision, which includes two key points: (i) the suggestion that the Union withdraws from the ECT, and (ii) the recommendation that it refrains from opposing an amendment to modernize the treaty.³⁸ The first issue was approved by the European Council and voted in favor by the European Parliament in April 2024, but the decision not to obstruct the ECT's modernization is still pending.³⁹

III. SUNSET CLAUSE: A POTENTIAL FOR NEW INVESTMENT DISPUTES IN THE FOSSIL FUELS SECTOR?

Withdrawing from the ECT is not an immediate solution to avoid ISDS claims by fossil fuel investors. This is because of a sunset clause under article 47(3) of the ECT, which provides that any investor with existing investments as of the date the withdrawal becomes effective⁴⁰ may still enjoy protection—and

(Feb. 22, 2024), <https://www.gov.uk/government/news/uk-departs-energy-charter-treaty> (last visited Feb. 23, 2024). As of March 2024, the ECT Secretariat has not yet reported the United Kingdom's withdrawal notification.

36. *Withdrawal Proposal*, *supra* note 20.

37. Marta Pacheco, *Belgian Presidency seals withdrawal fix from Energy Charter Treaty*, EURONEWS (Mar. 1, 2024), <https://www.euronews.com/green/2024/03/01/belgian-presidency-seals-withdrawal-fix-from-energy-charter-treaty> (last visited Mar. 4, 2024).

38. European Commission, *Proposal for a Council Decision on the Position to be Taken on Behalf of the European Union in the Energy Charter Conference 9–10* (Mar. 1, 2024) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52024PC0104> [hereinafter *March 2024 Proposal*].

39. Lisa Bohmer, *EU Parliament votes in favor of EU's withdrawal from Energy Charter Treaty*, INV. ARB. REP. (April 24, 2024), <https://www.iareporter.com/articles/eu-parliament-votes-in-favor-of-withdrawal-from-energy-charter-treaty/>.

40. Withdrawal becomes effective a year after the member state notifies it to the depositary of the treaty. ECT, *supra* note 1, art. 47(2).

thus claim compensation for measures to be taken—for another twenty years into the future.⁴¹

The E.U. is aware of this issue⁴² and has proposed alternatives to eliminate the sunset clause.⁴³ Nonetheless, the effectiveness of those proposals is highly debated and may certainly be contested in future disputes with investors affected by changes in regulation enacted after withdrawal.

The experience with other treaties withdrawn with similar sunset clauses shows that far from discouraging investors from filing new claims, these clauses incentivize them to rush and institute arbitration proceedings against states during the sunset period. A clear example of this is the North American Free Trade Agreement (NAFTA), which, even after it was terminated by the United States-Mexico-Canada Agreement (USMCA),⁴⁴ was available to investors due to the latter's legacy clause.⁴⁵ During the three-year legacy period, at least 16 investors filed claims under NAFTA against its member states as of

41. *Id.* art. 47(3) (“[t]he 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.”).

42. See, e.g., Kijewski & Moens, *supra* note 14 (noting that the European Commission argued that not entering into the Agreement in Principle “would only make things worse, because the 10-year phase out of protections for existing fossil fuel projects would not apply, leaving governments exposed to the 20-year sunset clause even as they ramp up their efforts to reach net zero emissions”).

43. See European Commission, *Non-Paper from the European Commission: Next Steps As Regards the EU, Euratom and Member States’ Membership in the Energy Charter Treaty* at 6 (Feb. 7, 2023), https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf [hereinafter *Commission Non-Paper*]; and *Withdrawal Proposal*, *supra* note 20, at 3.

44. See CHIN LENG LIM ET AL., *INTERNATIONAL INVESTMENT LAW AND ARBITRATION. COMMENTARY, AWARDS AND OTHER MATERIALS* 66 (2d ed. 2021).

45. See United States-Mexico-Canada Agreement, Annex 14-C, art. 14.C.3, Dec. 13, 2019, T.I.A.S. No. 19-1002, 33 I.L.M. 289 (2019) (providing for a three-year sunset period until June 30, 2023, for investors to present claims under NAFTA referred to investments established or acquired before that period).

March 2023,⁴⁶ representing fifteen percent of cases submitted to ICSID just in 2023.⁴⁷

In the context of a twenty-year sunset clause, it would be virtually impossible for the E.U. and its member states to impose a transition to renewable energies without facing claims by fossil fuels producers. For example, past experiences show that Italy, the first E.U. country to withdraw from the ECT in 2016, has subsequently faced lawsuits from several investors in at least seven arbitrations.⁴⁸ Notably, in *Rockhopper v. Italy*, Italy was found liable and ordered to pay EUR 185 million to an English investor for its decision to prohibit offshore drilling in search of hydrocarbons.⁴⁹

For the E.U. and its member states to get rid of liability during this twenty-year period, scholars have analyzed three potential mechanisms to exclude the sunset clause. The first one is executing an *inter se* agreement (i.e., a new treaty between the parties withdrawing from the ECT) by which the E.U. and member states would agree to modify the ECT, under article 41(1)(b) of the 1969 Vienna Convention on the Law of Treaties (VCLT).⁵⁰ The second is executing an *inter se* agreement to “interpret” the provisions of the ECT according to article 31(3)(a) of the VCLT so as to exclude the application of the sunset clause.⁵¹ And the third is withdrawing from the ECT invoking a

46. See Lindsey D. Schmidt, Maria L. Banda & Brian Yeh, *Investors’ Right to Seek NAFTA Protections Set to Expire on 1 July 2023*, GIBSON DUNN 3 (Mar. 6, 2023), <https://www.gibsondunn.com/wp-content/uploads/2023/03/investors-right-to-seek-nafta-protections-set-to-expire-on-1-july-2023.pdf>.

47. *The ICSID Caseload – Statistics*, WORLD BANK GROUP 7 (2024), https://icsid.worldbank.org/sites/default/files/publications/ENG_The_ICSID_Caseload_Statistics_Issue%202024.pdf.

48. See Nathalie Bernasconi-Osterwalder et al., *Energy Charter Treaty Reform: Why Withdrawal Is An Option*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (June 24, 2021), <https://www.iisd.org/itm/en/2021/06/24/energy-charter-treaty-reform-why-withdrawal-is-an-option/>.

49. *Rockhopper Italia S.P.A. et al. v. Italian Republic*, ICSID Case No. ARB/17/14, Award (Aug. 23, 2022), <https://jsumundi.com/en/document/decision/pdf/en-rockhopper-exploration-plc-rockhopper-italia-s-p-a-and-rockhopper-mediterranean-ltd-v-italian-republic-final-award-wednesday-24th-august-2022>.

50. See Vienna Convention on the Law of Treaties art. 41(1)(b), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; Johannes Tropper, *Withdrawing from the Energy Charter Treaty: The End is (not) Near*, KLUWER ARB. BLOG (Nov. 4, 2022), <https://arbitrationblog.kluwerarbitration.com/2022/11/04/withdrawing-from-the-energy-charter-treaty-the-end-is-not-near/>.

51. Morgandi & Bartels, *supra* note 7, at 153.

fundamental change of circumstances under the *rebus sic stantibus* doctrine.⁵²

The E.U. is currently contemplating the second option—an “interpretation” of the ECT through an *inter se* agreement, which would provide that the sunset clause is not applicable to investors of the parties that sign such an agreement.⁵³ The E.U. favors this approach, as its position is that ISDS within the Union contradicts E.U. law, and an interpretation would serve to “clarify” that the ECT “never” applied to intra-E.U. disputes. It cannot frame the *inter se* agreement as a “modification” because this would be acknowledging that intra-E.U. ISDS was possible before.⁵⁴

Several commentators have raised doubts about the effectiveness of this proposal.⁵⁵ This is because, under article 31(3)(a) of the VCLT,⁵⁶ all the parties to an original treaty need to execute the subsequent agreement that would interpret its obscure terms.⁵⁷ Contrary to the E.U.’s proposal, an *inter se* agreement providing for a binding interpretation under this article is not feasible without the consent of the other non-E.U. members of the ECT. And the European Commission has admitted that “no non-EU Contracting Party has indicated that they would be open to such a solution,”⁵⁸ making it impossible to prevent ISDS with nationals of those parties and E.U. states.

To overcome this hurdle (at least for intra-E.U. claims), the E.U. proposed framing the *inter se* agreement “interpreting” the

52. This theory has not been considered by the E.U. and the authors who propose it recognize that it would be very difficult for it to apply here. See Morgandi & Bartels, *supra* note 7, at 159–60.

53. *Commission Non-Paper*, *supra* note 43, at 6; and *Withdrawal Proposal*, *supra* note 20, at 3.

54. *Withdrawal Proposal*, *supra* note 20, at 3.

55. See, e.g., Tropper, *supra* note 50; Morgandi & Bartels, *supra* note 7, at 154–55; and Lawn & San Martin, *supra* note 11. But see Bernasconi-Osterwalder, *supra* note 48; and Martin Dietrich Brauch, *Should the European Union Fix, Leave or Kill the Energy Charter Treaty?*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT 7 (2021), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1189&context=sustainable_investment_staffpubs (stating that the E.U. member states could enter an *inter se* agreement under article 41 of the VCLT to eliminate the sunset clause of the ECT).

56. See VCLT, *supra* note 50, art. 31(3)(a) (interpretation via “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”) (emphasis added).

57. Morgandi & Bartels, *supra* note 7, at 154, 159.

58. *Commission Non-Paper*, *supra* note 43, at 6.

ECT under article 41 of the VCLT. In other words, it would “modify” the ECT by including an interpretation regarding the application of its sunset clause. This approach is problematic because the VCLT does not expressly recognize the possibility of entering a modification agreement to “interpret” a treaty.⁵⁹ In fact, the effects of “interpreting” and “modifying” a treaty are quite different, where the former would apply retroactively (*ex tunc*) and the latter would apply only to the future (*ex nunc*).⁶⁰ In addition, the first seeks to clarify the meaning of the text of an existing treaty, while the second aims at changing the application of a provision, although the text is clear.⁶¹

Even if the E.U. were to consider a pure modification under article 41 of the VCLT—which it has not—this would hardly meet the VCLT’s requirements. A modification must not (i) be prohibited by the treaty in question, (ii) affect the rights of other treaty parties, and (iii) undermine the object and purpose of the treaty.⁶² In this case, commentators tend to agree that the derogation of the ECT’s sunset clause could be contrary to the ECT’s object and purpose, which was to grant vast protections to foreign investors in the energy sector.⁶³

This indicates that the E.U.’s attempts to eliminate the sunset clause are, at the very least, highly questionable and problematic. Foreign investors are unlikely to readily accept these changes without disputing them.

IV. CONCLUSION

Despite the E.U.’s commendable motivations and earnest efforts to combat climate change, their current stance raises several questions that will need resolution in the future. This situation casts doubt on the efficacy of the proposed measures to expedite decarbonization without preventing potential international responsibilities. What is clear is that with the current

59. Morgandi & Bartels, *supra* note 7, at 155.

60. *Id.*

61. *Id.* at 154.

62. VCLT, *supra* note 50, art. 41(1)(b).

63. Morgandi & Bartels, *supra* note 7, at 158–59. See also Tropper, *supra* note 50; and Haris Huremagić & Johannes Tropper, *Mission Impossible?: Implementing Komstroy and Modifying the Energy Charter Treaty*, VÖLKERRECHTSBLOG (Nov. 17, 2021), <https://voelkerrechtsblog.org/de/mission-impossible/> (last visited Mar. 4, 2024).

ISDS system in place, foreign investors protected by the ECT will still have a chance to resort to international arbitration to seek redress for any measures taken by the E.U. states, and the outcome of those claims is uncertain.

Considering the divergencies between the E.U.'s interpretation of intra-E.U. investment treaties⁶⁴—including the ECT⁶⁵—and the position taken by the majority of arbitral tribunals until now,⁶⁶ it is possible to imagine that a new conflict will arise between arbitrators applying the terms of the ECT and taking different views on a potential *inter se* agreement limiting the application of the sunset clause, and the subsequent enforcement of arbitral awards within the E.U. Even in a case where Europe can guarantee non-enforcement of these awards within its borders, it would still face proceedings before the courts of non-E.U. countries.

In summary, the ECT still seems poised to stand the test of time for many years to come.

64. See generally Achmea, *supra* note 19; and Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, art. 2, 2020 O.J. (L 169) 4.

65. See generally Komstroy, *supra* note 19.

66. See *March 2024 Proposal*, *supra* note 37, at 3.