

SIDIBlog^{quaderni di}

il blog della Società italiana di Diritto internazionale
e di Diritto dell'Unione europea

Volume 10 • 2023

ISSN 2465-0927

Conflitti armati contemporanei: implicazioni e reazioni •
Politiche migratorie e nuovi strumenti giuridici: analisi e criticità •
Sviluppi in materia di immunità degli Stati
e dei funzionari internazionali • Evoluzioni e involuzioni
in materia di diritti umani • Tutela della persona nei rapporti tra privati •
Vecchie e nuove sfide per l'Unione europea •
Global South, diritto internazionale, diritto dell'Unione europea

editoriale scientifica

Reflections at the Sunset: the Strategy of the European Commission for a Coordinated Withdrawal from the Energy Charter Treaty

MATTIA COLLI VIGNARELLI*

TABLE OF CONTENTS: 1. Introduction. – 2. The epic of the ECT, in a nutshell. – 3. The proposal of the Commission and its problems: the *inter se* agreement. – 4. The contours of a possible strategy for withdrawal. – 5. Art. 41 VCLT as a rule for reasonable flexibility in international law. – 6. Does the ECT prohibit *inter se* modifications? – 7. Does the *inter se* extinction of the sunset clause affect the rights and obligations of other parties to the ECT? – 8. Does the *inter se* extinction of the sunset clause prejudice the effective execution of the object and purpose of the ECT as a whole? – 9. Conclusion.

ABSTRACT: The contribution investigates one of the latest chapters of the epic of the Energy Charter Treaty (ECT): the European Commission's strategy for a 'coordinated' withdrawal of the European Union and its Member States from the treaty. The Commission aims to eliminate the main obstacle to a 'safe' exit from the treaty, that is the *sunset clause* provided by Art. 47(3) ECT. This rule extends the force of the treaty for two decades after withdrawal. Given the uncertainties of the Commission's proposal, which unconvincingly overlaps the notions of 'subsequent agreement on treaty interpretation' and '*inter se* modification', the analysis turns to discuss the compatibility of a proper *inter se* modification abrogating the ECT sunset clause with the conditions laid down in Art. 41 VCLT.

KEYWORDS: Energy Charter Treaty – Sunset Clause – Withdrawal – Inter Se Agreement – Investment Arbitration – Law of Treaties.

1. Introduction

On 24 April 2024, the European Parliament adopted by an overwhelming majority a recommendation from the Industry, Research, Energy and In-

* PhD Student in International Law, University of Turin, mattia.collivignarelli@unito.it.

ternational Trade Committees consenting the European Union to withdraw from the Energy Charter Treaty (ECT)¹. The Council is now expected to adopt the decision on the matter by a qualified majority. The Union will notify its withdrawal in accordance with Art. 47(1) ECT and, one year after the notification, will cease to be a party to the treaty.

The now (almost) written divorce between the European Union and the ECT can be explained by arguing that this treaty represents «a formidable practical obstacle to the transition to greener energy»² and a fundamental piece of an energy governance paradigm based on the expansion of fossil fuel extraction and consumption. The European Commission itself, given the impossibility of approving the reformed text of the agreement, accepted withdrawal as inevitable due to the incompatibility of the current ECT with European energy and climate policy³.

Some experts in the field counter this position mentioning the many cases concerning renewable energy investment⁴, which would show the potential of investor-state arbitration in promoting energy transition. However, this argument does not confront the absence of evidence regarding the correlation between investment arbitration and the increase in foreign investment flows⁵. Furthermore, it does not consider the distributional effects of investment arbitration precisely in the management of energy transition⁶.

¹ 560 votes to 43, with 27 abstentions. See European Parliament, *Legislative resolution on the draft Council decision on the withdrawal of the Union from the Energy Charter Treaty*, 2023/0723(NLE), 24 April 2024, available at www.europarl.europa.eu.

² See J. KLABBERS, *A Moral Holiday: Withdrawal from the Energy Charter Treaty*, in *ESIL Reflections*, 15 December 2022.

³ See European Commission, *Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty*, COM/2023/447 final, 7 July 2023.

⁴ See for example the report by the Energy Charter Secretariat on investment cases under the ECT, 4 May 2023, available at www.energycharter.org

⁵ For a critical overview of the conventional wisdom on investment law see A. ARCURI, F. VIOLI, *Public Interest and International Investment Law: A Critical Perspective on Three Mainstream Narratives*, in J. CHAISSE, L. CHOUKROUNE, S. JUSOH (eds), *Handbook of International Investment Law and Policy*, Singapore, 2021, p. 2185 ff.

⁶ See on this issue K. TIENHAARA, C. DOWNIE, *Risky Business? The Energy Charter Treaty, Renewable Energy, and Investor-State Disputes*, in *Global Governance: A Review of Multilateralism and International Organizations*, 2018, p. 451 ff. More generally, for some interventions on the political-economic conflicts underlying low-carbon transitions, see B.K. SOVACCOOL, *Contestation, Contingency and Justice in the Nordic Low-carbon Energy Transition in Energy Policy*, 2017, p. 569 ff.; N. HEALY, J. BARRY, *Politicizing Energy Justice and Energy System Transitions: Fossil Fuel Divestment and a "Just Transition"*, in *Energy Policy*, 2017, p. 451 ff.; G. GODDARD, M. A. FARRELLY, *Just Transition Management: Balancing Just Outcomes*

In any case, the complex attempts – led by the European Commission⁷ – to respond to the above criticism through a reformist effort have definitively failed⁸. With the vote of the European Parliament, the ECT epic has entered a new stage. To be clear, the story will not end here. Like in the finest novels, every chapter reveals fresh details, ties up some narrative threads and introduces new ones, piques curiosity and leaves ample space for the reader's imagination. Therefore, the ECT saga is bound to continue for a long time, and so will the lively debates associated with it⁹.

with *Just Processes in Australian Renewable Energy Transitions*, in *Applied Energy*, 2018, p. 110 ff.; D. GABOR, *The Wall Street Consensus*, in *Development and Change*, 2021, p. 429 ff.; M. S. KNUTH, *Rentiers of the Low-carbon Economy? Renewable Energy's Extractive Fiscal Geographies*, in *Environment and Planning A: Economy and Space*, 2023, p. 1548 ff. For examples of contributions on the role of law in shaping and maintaining forms of socio-ecological injustice, see A.P. HARRIS, *Toward a Law and Political Economy Approach to Environmental Justice*, in S.A. ATAPATTU, C.G. GONZALEZ, S.L. SECK (eds) *The Cambridge Handbook of Environmental Justice and Sustainable Development*, Cambridge, 2021, p. 453 ff.; J. DEHM, *Reconfiguring Environmental Governance in the Green Economy: Extraction, Stewardship and Natural Capital*, in U. NATARAJAN, J. DEHM (eds) *Locating Nature: Making and Unmaking International Law*, Cambridge, 2022, p. 70 ff.

⁷ The Commission was mandated to negotiate a new text reflecting «climate change and clean energy transition goals and contribute to the achievement of the objectives of the Paris Agreement» (*Negotiating Directives for the Modernisation of the Energy Charter Treaty to the Council Decision 10745/19 set out in Doc. 10745/19*, Doc. 9305/19 + ADD 1, available at www.data.consilium.europa.eu). The first EU proposal to that extent was sent to the ECT Secretariat in May 2020 and made available to the public (see www.ec.europa.eu) In January 2021, an additional submission was released (see www.ec.europa.eu).

⁸ See the Public Communication explaining the main changes contained in the agreement in principle, Energy Charter Conference approved at its ad hoc meeting held on 24 June 2022, available at www.energycharter.org

⁹ The doctrine on the subject is extensive. See (only regarding the more recent vicissitudes of this treaty) on the EU reform proposal: M. VICENTE, *The European Union's Proposal for the Modernization of the Energy Charter Treaty*, in *European Energy and Environmental Law Review*, 2022, p. 124 ff.; J. TROPPEL, K. WAGNER, *The European Union Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?*, in *The Journal of World Investment & Trade*, 2022, p. 813 ff. On the final outcome of the 'modernisation' process: M. COLLI VIGNARELLI, *Making the Energy Charter Treaty Climate-Friendly: an (Almost) Impossible Leap*, in J. BÄUMLER, C. BINDER, M. BUNGENBERG, M. KRAJEWSKI, G. RÜHL, C.J. TAMS, J. PHILIPP TERHECHTE, A.R. ZIEGLER (eds), *European Yearbook of International Economic Law 2022*, 2023, p. 268 ff.; M. R. MAURO, *Investment Disputes and Fight against Climate Change in Light of the Energy Charter Treaty: The Delicate Position of the European Union in Transnational Dispute Management*, 2023, p. 1 ff.. For perspectives (and references) regarding the conflict between investment agreements and EU treaties: G. ZARRA, *The Arbitrability of Disputes Arising from intra-EU BITs*, in *The American Review of International Arbitration*, 2014, p. 573 ff.; C. CELLERINO, *More on the Constitutional Dimension of the Achmea Ruling and... 'Less' on Its Impact on the ICS*, in *European Legal Forum*, 2019, p. 1 ff.; S. SALUZZO, *La natura erga omnes partes degli obblighi derivanti dalla Convenzione ICSID e il*

Against this background, this contribution focuses on how the European Commission has proposed to manage the withdrawal from the ECT, discussing how the Commission's strategy would (not) address the legal consequences of such a rupture. Indeed, as much as the EU and its Member States may decide to take this step in a 'coordinated' manner, we would still face a series of unilateral withdrawal procedures, under Art. 47 ECT. As it is well known, the main obstacle is the so-called *sunset clause* provided by Art. 47(3) ECT, according to which: «[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».

Any withdrawing party should carefully consider this clause, which extends the effects of the treaty for twenty years from the entry into force of withdrawal. This is well known to Italy, which had withdrawn already in 2016 and, nonetheless, in the *Rockhopper v. Italy* case was ordered to compensate a British fossil-fuel investor for an amount above EUR 240 million¹⁰. The investor had started the arbitral proceedings in 2017 – after the acquisition of an oil company that had been denied a permit to exploit the *Ombrina Mare* site – thanks to the effects of the sunset clause¹¹.

Therefore, this contribution aims to take stock of the fragility in the Commission's approach to the issue of withdrawal from the ECT and to identify possible avenues for an 'exit strategy' coherent with the ambition to remove what the European Union claims to be an obstacle to the im-

rapporto con il diritto dell'Unione Europea, in *Osservatorio sulle fonti*, 2020, p. 883 ff.; N. BERGAMASCHI, *Il lodo Green Power and SCE v Spain dalla prospettiva del diritto dell'Unione europea: una risposta al problema dell'effettività dell'autonomia dell'ordinamento?*, in *Quaderni di SIDIBlog*, 2023, p. 339 ff.; G. LAMPO, *L'arbitrato in materia di investimenti intra-UE sulla base del Trattato sulla Carta dell'energia: alcune considerazioni sul lodo Green Power c. Spagna*, in *Quaderni di SIDIBlog*, 2023, p. 319 ff.; L. MAROTTI, *L'Unione Europea e le strategie di «disconnessione» dall'Energy Charter Treaty*, in *Rivista di Diritto Internazionale*, 2023, p. 155 ff.; M. COLLI VIGNARELLI, *Can the European Union Serve Two Masters? Revisiting the Conflict Between EU Treaties and Investment Agreements Under the Law of Treaties*, in *Diritto del Commercio Internazionale*, 2024, p. 31 ff.

¹⁰ See ICSID, final award of 23 August 2022, case no. ARB/17/14, *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*.

¹¹ For a critical comment on *Rockhopper v. Italy*, see A. ARCURI, *On How the ECT Fuels the Fossil Fuel Economy: Rockhopper v Italy as a Case Study*, in *Europe and the World: A Law Review*, 2023, p. 1 ff.

plementation of measures to combat climate change and advance the energy transition.

2. The epic of the ECT, in a nutshell

The agreement in principle on the 'modernisation' of the ECT was announced simultaneously by the Energy Charter Secretariat and the Directorate-General for Trade of the European Commission on 24 June 2022¹². The Commission, in particular, emphasised that it had obtained «a coherent and up-to-date framework» capable of providing «legal certainty and (...) a high level of investment protection while reflecting clean energy transition goals and contributing to the achievement of the objectives of the Paris Agreement»¹³.

This enthusiasm, however, did nothing to prevent a large group of EU Member States from tearing themselves away¹⁴. In the weeks following the announcement of the agreement, the governments of several EU Member States announced their intention to withdraw¹⁵. To date, France, Germany, Poland, Luxembourg, Slovenia and Portugal officially notified withdrawal to the depositary of the treaty, under Art. 47(1) ECT¹⁶. As already mentioned, Italy has to be added to the list.¹⁷

When the first withdrawal announcements were made, the Conference of the Parties to the ECT – initially scheduled for November 2022 with the task of adopting the reformed text of the treaty – had to be postponed to a date to be determined, due to the opposition to any possibility of approval

¹² See the Public Communication by the Energy Charter Conference, 24 June 2022, available at www.energycharter.org and the press release by the DG Trade (European Commission, *Agreement in principle reached on Modernised Energy Charter Treaty*, 24 June 2022, www.ec.europa.eu).

¹³ *Ibid.*

¹⁴ For a critique of the role of the Commission (and the DG Trade in particular) in the ECT reform process, see C. ECKES, *The Autonomy of the EU Legal Order: The Case of the Energy Charter Treaty*, in *European Papers*, 2023, p. 1465 ff.

¹⁵ See European Parliament, *Resolution on the outcome of the modernisation of the Energy Charter Treaty*, 2022/2934(RSP), 24 November 2022 available at www.eur-lex.europa.eu.

¹⁶ Ironically, the depositary is Portugal, the latest withdrawing state. See www.energycharter.org for updates on the current status of withdrawal notifications. France's, Germany's and Poland's withdrawal became effective in December 2023. Luxembourg's exit will be official in June 2024, Slovenia's in October 2024 and Portugal's in February 2025.

¹⁷ Furthermore, the United Kingdom announced its withdrawal on 24 February 2024. See UK Government, *UK departs Energy Charter Treaty*, 22 February 2024, www.gov.uk.

of the reformed text by the European Parliament and a blocking minority in the Council¹⁸. At that point, the Commission was forced to accept the prospect of withdrawal¹⁹. The first official proposal to take this step in a 'coordinated' manner was therefore released on 7 July 2023²⁰. The document implicitly takes as a basis for the coordinated withdrawal a Communication of 5 October 2022, where the text of an «agreement between the Member States, the European Union and the European Atomic Energy Community on the interpretation of the Energy Charter Treaty» was proposed²¹.

In the second part of 2023, some Member States expressed within the Council their will to remain parties to the treaty²² and another 'pillar' to the overall strategy was tentatively added: in addition to authorising the EU withdrawal and the parallel negotiations for an agreement for coordinated exit, the EU and its Member States would agree not to obstruct the approval of the reformed text within the Energy Charter Conference²³.

3. The proposal of the Commission and its problems: the *inter se* agreement

The relevant part of the Commission document of 7 July 2023, in which the sunset clause is taken into consideration, asserts that:

¹⁸ See *supra* note 15.

¹⁹ A leaked 'non-paper' circulated by the European Commission is available at www.euractiv.com.

²⁰ See European Commission, *Proposal for a Council decision on the Union withdrawal from the Energy Charter Treaty*, COM(2023) 447 final, as well as the accompanying documents available at www.ec.europa.eu.

²¹ See the Communication from the Commission to the European Parliament and the Council, as well as to the Member States 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, available at www.eur-lex.europa.eu.

²² This was reported e.g. in M. DULIAN, *EU withdrawal from the Energy Charter Treaty*, European Parliament Policy Briefing, 4 December 2023, p. 5.

²³ This would ensure, among other more or less relevant amendments, the inclusion of a 'disconnection clause' that would recognise the Union's position on the inapplicability of Art. 26 ECT (the investor-state arbitration clause) to intra-EU relations. It seems unlikely that arbitral tribunals would recognise its merely interpretative function, and thus its relevance for states not party to the reformed treaty. In other words, this clause should not apply to states whose withdrawal entered into force before the entry into force of the reformed treaty. See L. MAROTTI, *L'Unione Europea e le strategie di «disconnessione» dall'Energy Charter Treaty*, cit., p. 163-164.

«Article 47(3) of the ECT would have no impact on intra-EU relations, to which the ECT has never, does not and will never apply, including its Art. 47(3). However, (...) there is a risk of legal conflict that must be eliminated. The Commission remains of the view that the appropriate response is to adopt an instrument that is a 'subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions' within the meaning of Art. 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT), among the Member States, the Union and EURATOM. (...) The interpretation of the EU and its Member States [should be codified] in a separate treaty (something that is possible because of the bilateral nature of the obligations)».

The Commission recognises the «risk of legal conflict» deriving from unilateral withdrawal. It is no mystery that although the Court of Justice of the European Union (CJEU) is granitic in upholding the incompatibility of intra-EU arbitration with the autonomy of EU law and the mutual trust among Member States²⁴, equally firm is the position of arbitral tribunals in confirming their jurisdiction, except in the (so far isolated) *Green Power v. Spain* case²⁵. This means that the *sunset clause* would in all probability extend this conflict for twenty years, in part thwarting the concrete impact of withdrawal.

However, the Commission's proposal to deal with this issue is simply inadequate. In its draft proposal of October 2022, the Commission evokes a sort of «interpretative *inter se* agreement»²⁶, an odd mix of Arts 31(3)(a) and 41 VCLT. The former concerns subsequent agreements on treaty *interpretation* and the latter *modification* agreements between certain parties only. This confusion clearly emerges in the preamble of the first draft of the Commission's proposal, where it is possible to read that

«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 Art. 41(2) VCLT, and

²⁴ See CJEU, judgment of 6 March 2018, C-284/16, *Slowakische Republik v. Achmea BV*.

²⁵ *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022.

²⁶ T. MORGANDI, L. BARTELS, *Exiting the Energy Charter Treaty under the Law of Treaties*, in *King's Law Journal*, 2023, p. 145 ff.

CONSIDERING that Art. 41(2) VCLT applies *a fortiori* to any subsequent agreement within the meaning of Art. 31(3)(a) regarding interpretation of the ECT (...).

Later, the second Section of the draft agreement is titled «provisions confirming the non-applicability of the Energy Charter Treaty within the Union». One of its provisions, Art. 2, states that «the ECT does not apply, and has never applied to intra-EU relations» and that «Article 47(3) ECT (...) cannot have produced any intra-EU legal effects when a Member State withdrew from the ECT prior to this agreement, nor shall produce any intra-EU legal effects if a Member State withdraws from the ECT subsequently».

Although creativity is a virtue, here we have too much of a good thing. In a paper which addresses the prospects for ECT withdrawal, Tibisay Morgandi and Lorand Bartels recall a basic feature of the law of treaty: it does not provide for interpretative *inter se* agreements²⁷. Indeed, subsequent agreements on treaty interpretation require by definition the unanimity of the parties²⁸. Of course, nothing prevents a party to a treaty (or a group of parties) from issuing a unilateral interpretative declaration in relation to a certain obligation therein. However, the relevance of such a declaration would inevitably be close to zero²⁹. Furthermore, also 'proper' subsequent agreements are not necessarily *conclusive* in interpretative terms and, in any case, they cannot disguise an *amendment* to the treaty³⁰.

²⁷ *Ibid.*

²⁸ See also L. MAROTTI, *L'Unione Europea e le strategie di «disconnessione» dall'Energy Charter Treaty*, cit.

²⁹ According to the International Law Commission (ILC): «Interpretative declaration» means a unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions». See ILC, *Guide to Practice on Reservations to Treaties 2011 with Commentaries*, in *Yearbook of the International Law Commission*, vol. II, Part Two, 2011, p. 26 ff.

³⁰ On the non-conclusive nature of subsequent agreements see Draft Conclusions on Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties, A/73/10, 2018, para 4. The reason to distinguish between 'authentic means of interpretation' and 'disguised amendments' concerns the question of intertemporal application of the law: amendments – at least as a rule, if the parties do not otherwise agree – have no retroactive value. On the contrary, interpretative means do not modify the 'radius' of the rule but more or less 'forcibly' guide the interpreter in its choice of what is already the law as it is. Hence, so to say, they have 'retroactive' effects – even if talking of 'retroactivity' implicitly betrays a contradictory conception of any interpretative means as disguised amendments. For discussions L. MALINTOPPI, H. HAERI, *The Non-Disputing State Party in In-*

It is undeniable that the distinction between 'interpretative agreements' and 'disguised amendments' is largely a matter of persuasion. However – if the goal is to *eliminate* the risk of the sunset clause – playing with interpretative nuances is certainly not an effective strategy³¹. In this formulation, the Commission's proposal risks being deemed legally irrelevant by arbitral tribunals. By pursuing this course of action, the Commission would not adequately address the problem it purports to solve.

4. The contours of a possible strategy for withdrawal

Although the proposal for coordinated withdrawal is currently formulated in unsatisfactory terms, it contains the core of a possible strategy. A way to eliminate the problem of the sunset clause *at the root* seems to exist, but it cannot be based on the mere reiteration of the position that the ECT «does not apply and has never applied» in intra-EU relations, which the arbitral tribunals have repeatedly shown to ignore³². In other terms, the European Commission should not promote an impracticable interpretative agreement, but rather a 'genuine' *inter se* modification to extinguish Art. 47(3) ECT between the parties to the modified regime. Following such an agreement (provided, as discussed below, its compatibility with the law of treaties), the notification of withdrawal could follow without further consequences. Of course, the sunset clause would continue to operate in the legal relations with states outside the *inter se* agreement.

It should be noted that such an agreement should not *a priori* be concluded only by the EU Member States. On the contrary, it would be rec-

vestment Arbitration in D.D. CARON, S.W. SCHILL, A. COHEN SMUTNY, E.E. TRIANTAFILOU (eds), *Practising Virtue*, Oxford, 2015, p. 565 ff.; K. MAGRAW, *Trends and ISDS Backlash Related to Non-Disputing Treaty Party Submissions* in C. Titi (ed.), *Public Actors in International Investment Law*, Cham, 2021, p. 79 ff.

³¹ And it is also quite clear that most investment tribunals are not 'persuaded' that Art. 26 ECT does not apply to EU intra-EU relations.

³² See among dozens of awards ICSID, award of 27 December 2016, case no. ARB/14/3, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*; ICSID, award of 26 July 2018, case no. ARB/13/27, *Marfin v. Cyprus*, para. 579-580; ICSID, decision on jurisdiction, 7 February 2020, case no. ARB/15/49, *Adamakopoulos v. Greece*, although with a dissenting opinion (*ibid.*, statement of dissent of Professor Marcelo Kohen); PCA, final award of 11 May 2020, case no. 2017-15, *AMF v. Czech Republic*; ICSID, decision on the *Achmea* issue of 31 August 2018, case no. ARB/12/12, *Vattenfall AB and others v. Federal Republic of Germany (II)*; ICSID, decision on the intra-EU jurisdictional objection of 29 June 2019, case no. ARB/17/14, *Rockhopper v. Italy*; ICSID, decision on respondent request for reconsideration regarding the intra-EU objection and the merits of 1 February 2022, case no. ARB/16/18, *Infracapital F1 S.à r.l. and Infracapital Solar B.V. v. Kingdom of Spain*.

commendable to open it to all available ECT Contracting Parties, irrespective of their eventual choice to withdraw from the treaty. Of course, this is not a risk-free choice, as will be seen in a moment. However, the more the strategy is shared, the more likely it is that the path of withdrawal will lead to the desired outcome.

In practical terms, the ECT parties aiming to ‘safely’ withdraw should notify other contracting states of their ongoing negotiations on an *inter se* agreement to extinguish Art. 47(3) ECT. After a reasonable time expressed in the written notification³³, provided that no party objects, such an *inter se* agreement may be finalised. It should straightforwardly and explicitly abrogate Art. 47(3) ECT. With the entry into force of the modification, the parties to the *inter se* agreement would be able to break their ties with the treaty definitively. Of course, the *sunset clause* would still operate in the relations with all the other ECT parties.

Arguably, the *inter se* abrogation of the ECT could be extended to those states that have already withdrawn from the ECT. Indeed, on the one hand, according to Art. 47(2) ECT, the withdrawal «takes effect» one year after its notification. This means the withdrawing state is no longer a ‘party’ to the treaty. On the other hand, however, with the activation of the sunset clause under Art. 47(3) ECT, the treaty «shall continue to apply». As a result of this rule, the treaty is still binding for the withdrawing state until the expiry of the twenty years prescribed by the norm. Thus, provided that the conditions of Art. 41 VCLT are satisfied, the sunset clause may also be terminated in relations with states against which it is being applied, on the basis of reciprocal consent³⁴. Arguing the contrary would be paradoxical because the purpose of *inter se* agreements is precisely to modify the application of a treaty in relations between certain states³⁵.

At this point, the question is clear: is such a strategy permissible under the law of treaties and, in particular, under Art. 41 VCLT? The following pages aim to answer this question.

³³ Perhaps three months, based on Art. 65 VCLT.

³⁴ This position is supported in N. BRAOUDAKIS, R. CRAVEIA, C. BALDON, *Neutralising the ECT Sunset Clause Inter Se*, in *ICSID Review*, 2024, p. 1 ff. All the above is without prejudice to the issue of the normative conflict between the ECT and EU treaties. Elsewhere – in concurrence with a view that remains minoritarian in international investment law doctrine – a view has been expressed that the ECT should be disapplied in intra-EU disputes, in light of the operation of the primacy of EU law as a conflict rule under Art. 30(2) VCLT. See M. COLLI VIGNARELLI, *Can the European Union Serve Two Masters*, cit.

³⁵ See N. BRAOUDAKIS, R. CRAVEIA, C. BALDON, *Neutralising the ECT Sunset Clause Inter Se*, cit.

5. Art. 41 VCLT as a rule for reasonable flexibility in international law

Art. 41 VCLT regulates the possibility for two or more states party to a multilateral agreement to conclude an *inter se* agreement, i.e. an agreement modifying the general regime as between themselves³⁶. The rule provides that:

«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».

On a cursory reading of the provision, it is clear that the two conditions laid down in Art. 41(1)(b) are only relevant if the treaty *does not already regulate* the matter. Indeed, according to Art. 41(1)(a) VCLT, if a treaty specifically addresses modification, only its conditions apply: any other forms of modification become impermissible, even if in line with the conditions provided by Art. 41(1)(b). Hence, Art. 41(1)(a) and (b) are mutually exclusive.

³⁶ For commentaries on Art. 41 VCLT, see M. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, 2009, p. 528; A. RIGAUX, D. SIMON, *Article 41 Convention of 1969*, in O. CORTEN, O. KLEIN (eds) *The Vienna Convention on the Law of Treaties: a Commentary*, Oxford, 2011; K. VON DER DECKEN, *Article 41*, in O. DÖRR, K. SCHMALENBACH (eds), *Vienna Convention on the Law of Treaties: A Commentary*, Berlin, 2018, p. 777 ff. For a doctrinal contribution addressing the application of its conditions to a specific treaty, see N. BOISTER, M. JELSMA, *Inter se Modification of the UN Drug Control Conventions*, in *International Community Law Review*, 2018, p. 456 ff.

An example of a treaty allowing *inter se* modification by its own terms can be found in the UN Convention on the Law of the Sea (UNCLOS)³⁷. Art. 311(3) of this treaty states that:

«Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied therein, and that the provisions of such agreements do not affect the enjoyment by other States parties of their rights or the performance of their obligation under the Convention».

Except for some slight linguistic variations, this provision reiterates the conditions provided by Art. 41 VCLT, further specifying that the *inter se* agreement shall not «affect the application of the basic principles embodied» in the Convention.

More complex is the subject of *inter se* agreements within the European Union, where the issue of *inter se* modification of EU treaties is often a question of political debate, concerning the so-called differentiated integration³⁸. In essence, the EU legal order allows *inter se* agreements between Member States, provided that they do not relate to a matter of exclusive competence of the Union and they are not incompatible with EU law³⁹.

Under the residual VCLT regime, modification is admissible *unless* prohibited by the treaty, subject to the cumulative conditions provided by lit (i) and (ii) of Art. 41 VCLT. As recalled by Malgosia Fitzmaurice and Panos Merkouris, the International Law Commission was well aware that *inter se* agreements are «an essential technique, and a necessary safety valve, for the adjustment of treaties to the dynamic needs of international

³⁷ United Nations Convention on the Law of the Sea of 1982.

³⁸ A. MIGLIO, *Integrazione differenziata e principi strutturali dell'ordinamento dell'Unione Europea*, Torino, 2020; A. DIMOPOULOS, *Taming the Conclusion of Inter Se Agreements between EU Member States: The Role of the Duty of Loyalty*, in *Yearbook of European Law*, 2015, p. 286 ff.

³⁹ See A. DIMOPOULOS, *Taming the Conclusion of Inter Se Agreements between EU Member States*, cit.

society»⁴⁰. The drafters of the Convention explained: «The importance of the subject needed no emphasis; it involved reconciling the need to safeguard the stability of treaties with the requirements of peaceful change»⁴¹. The conditions provided by this treaty should be interpreted in light of this objective.

6. Does the ECT prohibit *inter se* modifications?

When examining the legitimacy of an *inter se* agreement to sterilise the sunset clause, the first step is to ask whether the ECT regulates the matter. At first glance, the answer seems quite obvious: the treaty does not provide for the possibility of *inter se* modification, nor does it expressly prohibit it. However, there are at least two argumentative obstacles to this conclusion.

A first objection might be that an *inter se* agreement would constitute a 'circumvention' of the prohibition of reservations pursuant to Art. 46 ECT⁴². In this regard, however, it should simply be recalled that Art. 41(1)(b) CVDT refers only to *explicit* prohibitions⁴³.

The second 'preliminary' objection concerns the relationship between the ECT and the hypothetical *inter se* modification. The interaction between the two agreements may be conceptualised as a special case of succession of agreements on the same subject matter⁴⁴. After the modification, two agreements would be in place, that is, the modified and the un-

⁴⁰ M. FITZMAURICE, P. MERKOURIS, *Treaties in Motion: The Evolution of Treaties from Formation to Termination*, Cambridge, 2020, p. 185.

⁴¹ International Law Commission (ILC), *Yearbook of the International Law Commission*, Vol. I, 1964, p. 144, quoted in M. JELSMA, N. BOISTER, D. BEWLEY-TAYLOR, M. FITZMAURICE, J. WALSH, *Balancing Treaty Stability and Change: Inter Se Modification of the UN Drug Control Conventions to Facilitate Cannabis Regulation*, Policy Report 7, 2018, available at www.tni.org.

⁴² Art. 46 ECT provides that: «No reservations may be made to this Treaty».

⁴³ This was the position of the majority of the Commission delegates during the negotiation of what would become Art. 41(1)(b), shared today by the vast majority of the doctrine. See M. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, cit., p. 534; A. RIGAUX, D. SIMON, *Article 41 Convention of 1969*, cit., p. 1001; K. VON DER DECKEN, *Article 41*, cit., p. 782; T. MORGANDI, L. BARTELS, *Exiting the Energy Charter Treaty under the Law of Treaties*, cit., p. 12; M. DE BOEK, *EU Law and International Investment Arbitration: The Compatibility of ISDS in Bilateral Investment Treaties (BITs) and the Energy Charter Treaty (ECT) with the Autonomy of EU Law*, Leiden, 2022, p. 89;

⁴⁴ See G. LAMPO, *The Relationship between Intra-EU Investment Arbitration under the Energy Charter Treaty and the Lisbon Treaty in Light of Article 41 of the Vienna Convention on the Law of Treaties*, in G. PASCALE, S. TONOLO (eds), *The Vienna Convention on the Law of Treaties: The Role of the Treaty on Treaties in Contemporary International Law*, Napoli, 2022, p. 327.

modified one. This would lead to consider the obstacle of Art. 16 ECT. The provision requires that nothing in the terms of prior or subsequent agreements conflicting with Part III or Part V of the ECT «shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution» when such provisions are more favourable to investors or investments. On this basis, some authors argue that regardless of the conditions of Art. 41 VCLT, Art. 16 ECT would lead to the disapplication of the less favourable regime, which is obviously the special *inter se* regime⁴⁵. Although it seems undeniable that the existence of the sunset clause is ‘more favourable’ to an investor than its absence, this reconstruction is not persuasive.

Indeed, the very purpose of Art. 41 VCLT is to *prevent* normative conflicts, by dictating specific conditions for *inter se* agreements modifying the application of a general regime⁴⁶. Instead, Art. 16 ECT is essentially a *conflict* rule. Should the conditions of Art. 41 VCLT be fulfilled, the ‘modified’ and the ‘unmodified’ treaty would not give rise to a normative conflict and, as a consequence, Art. 16 ECT would be of no relevance⁴⁷. In any case, subject again to Art. 41 VCLT, there is no reason why the ECT parties cannot agree to derogate from Art. 16 ECT itself⁴⁸. Therefore, there is no

⁴⁵ See also T. MORGANDI, L. BARTELS, *Exiting the Energy Charter Treaty under the Law of Treaties*, cit.

⁴⁶ However, the parties to a treaty may also end up concluding an *inter se* agreement which ‘may not conclude’, which should be disappplied in a concrete case. Indeed, as clarified by Art. 30(5) VCLT, the *lex posterior* criterium applies «without prejudice to Article 41», meaning that *only* the conditions of the latter govern the relationship between the unmodified and the modified treaty.

⁴⁷ According to Aust, «the provisions of Article 30 (4) (...) will not apply if an agreement to amend satisfies the conditions in Article 41 (see the saving provision in Article 30 [5])». Cfr. A. AUST, *Modern Treaty Law and Practice*, Cambridge, 2013, p. 274. Even more clearly, Von der Decken explains that «The legitimacy of the modification agreement depends on the criteria set out in Art 41. If a modification agreement meets the criteria, Art. 30, para. 4, is of no relevance. The modification agreement is valid for the States Parties to it, and no international responsibility follows» (K. VON DER DECKEN, *Article 41*, cit., p. 779. Similarly, J.B. MUS, *Conflicts between Treaties in International Law*, in *Netherlands International Law Review*, 1998, p. 226. *Contra*, Villiger argues that Art. 41 implies that «treaty parties modifying a treaty *inter se* cannot rely solely on Art. 30 when determining the relations between the modifying agreement and the original agreement». Cf. M. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, cit., p. 537.

⁴⁸ Some authors suggest that a first *inter se* agreement should extinguish Art. 16 ECT (see J. TROPPEL, *An Inter Se Modification of the ECT to Exclude Intra-EU Arbitration – How Can It Work?*, in *Kluwer Arbitration Blog*, 19 June 2023). In the view of this author, however, this would be redundant. Indeed, if the *inter se* termination of the sunset clause is lawful under

convincing argument to limit the possibility of concluding *inter se* agreements under the ECT outside of what is provided for in the Vienna Convention⁴⁹. To guarantee a satisfactory balance between stability and change, the legitimacy of a possible *inter se* agreement should be evaluated based on the conditions established by Art. 41(b) VCLT.

7. Does the *inter se* extinction of the sunset clause affect the rights and obligations of other parties to the ECT?

Thus, going into the merits of the conditions outlined in Art. 41 VCLT, the first doubt is whether the *inter se* agreement «affect[s] the enjoyment by the other parties of their rights under the treaty or the performance of their obligations». The 1966 ILC Commentary does not extensively clarify how this provision should be interpreted, except that the term 'affect' has to be interpreted as 'negatively affect'. Indeed, the first condition for the legitimacy of an *inter se* agreement is that it does not «prejudice [other parties'] rights or add to their burdens»⁵⁰.

In determining whether this condition is met, a distinction between treaties imposing obligations of a reciprocal nature or obligations owed *erga omnes partes* plays a decisive role⁵¹. The majority of international obligations are reciprocal. Even a multilateral agreement may well give rise to «a bundle of interwoven bilateral relationships dominated by the principle of reciprocity»⁵². Instead, the obligations owed to all the parties to a regime derive from an international regime in the maintenance and implementation of which all the States parties have a common legal interest, such as a disarmament convention or a human rights convention⁵³.

Obligations *erga omnes partes* are therefore characterised by the absence of reciprocity. Their fulfilment is simultaneously owed to all the

Art. 41 VCLT, then art. 16 ECT is irrelevant. If it is not, the unmodified ECT would prevail in a concrete case (irrespective of Art. 16 ECT).

⁴⁹ See also J. KLABBERS, *A Moral Holiday: Withdrawal from the Energy Charter Treaty*, cit.

⁵⁰ ILC, *Yearbook of the International Law Commission*, Vol. II, 1966, p. 235.

⁵¹ J. PAUWELYN, *The Role of Public International Law in the WTO: How Far Can We Go?*, in *American Journal of International Law*, 2001, p. 535 ff.

⁵² L. SICILIANOS, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, in *European Journal of International Law*, 2002, p. 1133.

⁵³ See ILC, *Yearbook of the International Law Commission*, vol. II, 2001, p. 118-119. Cf. J. PAUWELYN, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, in *European Journal of International Law*, 2003, p. 911 ff.

parties to a multilateral treaty collectively considered, entailing a legal interest in the protection of the rights involved⁵⁴.

In the field of international economic law, scholars have from time to time discussed the collective character of the ICSID Convention⁵⁵. The Supreme Court of the United Kingdom, in the *Micula* case, supported this position⁵⁶. It is useful to note, however, that the distinction between reciprocal and collective obligations should not be made by looking at the entirety of the treaty, but by having regard to its individual provisions⁵⁷. Indeed, it is possible to find different legal obligations within the same treaty, so that reciprocal obligations ‘cohabit’ with collective ones. This means that the first condition of Art. 41(b) VCLT may be satisfied if a modification concerns a specific reciprocal obligation and not a collective one. Indeed, in the case of reciprocal obligations, the need for change is accommodated, because the differentiated application of a treaty does not impact the legal sphere of the parties not involved in the modification. Instead, in the case of *erga omnes partes* obligations, this regime ‘fragmentation’ has an impact on their legal interest in the execution of the agreement⁵⁸. Stability cannot but prevail.

⁵⁴ The ICJ first operationalised this notion in ICJ, judgment of 20 July 2012, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, para. 68. The Court in that case analogised the *structure* of this type of obligation to that of *erga omnes* character, which are instead owed to the international community as a whole, as famously argued by the Court in ICJ, judgment of 5 February 1970, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, para. 33. According to the ICJ in *Belgium v. Senegal*, this ‘common interest’ «implies the entitlement of each State party to [that treaty] to make a claim concerning the cessation of an alleged breach by another State party» (ICJ, *Belgium v. Senegal*, cit., para. 69). The same view was later confirmed in ICJ, Judgement of 22 July 2022, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, paras 106-108 and in ICJ, order of 26 January 2024, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, para. 33.

⁵⁵ A. BROCHES, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, in *Collected Courses*, The Hague, 1972, p. 379-380; C. SCHREUER, L. MALINTOPPI, A. REINISCH, A. SINCLAIR, *The ICSID Convention. A Commentary*, II ed., Cambridge, 2009, p. 1109.

⁵⁶ For discussion, see S. SALUZZO, *La natura erga omnes partes degli obblighi derivanti dalla Convenzione ICSID e il rapporto con il diritto dell’Unione Europea*, in *Osservatorio sulle fonti*, 2020, p. 883 ff.

⁵⁷ See J. PAUWELYN, *A Typology of Multilateral Treaty Obligations*, cit., p. 925.

⁵⁸ S. SALUZZO, *Accordi internazionali degli Stati membri dell’Unione europea e Stati terzi*, Torino, 2018, p. 244.

In our case, Art. 47(3) ECT is not a 'self-standing' obligation. It simply extends for twenty years the application of the standards of protection and dispute settlement mechanisms established by the treaty. Therefore, the first condition of Art. 41(b) VCLT is satisfied if it is established that these substantive provisions are reciprocal. This condition seems to be clearly satisfied. All the ECT standards of treatment are formulated in terms of the relationship between the home state (and its investors) and the host state. Suggesting that all the parties to the ECT have a common legal interest in the protection of the investors and the investment of the home state made in the territory of the host state would be counterintuitive. Suffice it to say that Art. 17 ECT allows «[e]ach Contracting Party (...) to deny the advantages» of Part III, that is, investment protection, to

«(1) a legal entity if citizens or nationals of a third state own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organised; or

(2) an Investment, if the denying Contracting Party establishes that such Investment is an Investment of an Investor of a third state with or as to which the denying Contracting Party:

(a) does not maintain a diplomatic relationship; or

(b) adopts or maintains measures that:

(i) prohibit transactions with Investors of that state; or

(ii) would be violated or circumvented if the benefits of this Part were accorded to Investors of that state or to their Investments».

This provision certifies the transactional and bilateral logic of the ECT. To be clear, any multilateral treaty presupposes some *collective benefit* explaining its conclusion. This applies to the ECT as well. However, no *common legal interest* is envisaged by the standards of protection provided by this treaty and, as a reflection, by its dispute settlement provisions⁵⁹. A rule such as Art. 17 ECT does not resonate with the idea of 'community interests' underlying, for instance, human rights treaties. Far from it, Part III and Part V ECT appear to establish bilateral obligations⁶⁰. In turn, also the sunset clause is reciprocal. Hence, the first condition of

⁵⁹ The difference between the existence of a common benefit and a collective legal interest is underlined by S. SALUZZO, *La natura erga omnes*, cit., p. 901-902.

⁶⁰ But see G. LAMPO, *The Relationship between Intra-EU Investment Arbitration under the Energy Charter Treaty and the Lisbon Treaty*, cit., p. 328-336, who seems to assume the collective nature of Art. 26 ECT.

Art. 41(b) is satisfied by a modification excluding its application between certain parties to the ECT.

8. Does the *inter se* extinction of the sunset clause prejudice the effective execution of the object and purpose of the ECT as a whole?

Art. 41(1)(b)(ii) provides that modification shall 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». To determine the fulfilment of this condition, it seems intuitive to start by defining the ‘object and purpose’ of the ECT. This rather speculative exercise⁶¹ is guided by Art. 2 ECT, explicitly titled «purpose of the treaty». This provision states that the 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 Charter». The latter is the European Energy Charter, adopted in 1991. Analysing this document, the arbitral tribunal in *Vattenfall v. Germany* concluded that «the ECT aims to promote cooperation and the flow of international investment in the energy field to serve the ultimate goal of creating and maintaining a stable and efficient energy market»⁶².

The search for an answer on the fulfilment of the second condition of Art. 41(1)(b) VCLT does not seem to have gone much further up to this point. Unquestionably, Art. 47(3) ECT reflects the ‘stability’ goal of the ECT. However, this could be said in one way or another of any other provision of the treaty. The point here is to ask the right question, which is not whether the sunset clause *contributes* to the object and purpose of the ECT. What is important is whether the derogation from this provision would *prejudice* the effective execution of the object and purpose of the ECT *as a whole*⁶³. This is why the most persuasive way to approach the issue is to read the two conditions in conjunction: if an obligation included in a certain treaty is not owed *erga omnes partes*, its derogation will not affect the spheres of other parties’ rights and obligations and – at least in the majority of the cases – will not have a significant impact on the object

⁶¹ Villiger, for instance, defines it as the «treaty’s aim, its nature and its end». Cf. M. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, cit., p. 427.

⁶² See ICSID, decision on the *Achmea* issue of 31 August 2018, case no. ARB/12/12, *Vattenfall AB and others v. Federal Republic of Germany*, para. 198.

⁶³ See similarly K. VON DER DECKEN, *Article 41*, in O. DÖRR, K. SCHMALENBACH (eds), *Vienna Convention on the Law of Treaties. A Commentary*, Berlin, 2018, p. 783.

and purpose of the treaty, such as to render its modification *inter se* unlawful⁶⁴.

Hence, the reasoning proposed for the first condition seems once again compelling. Given the reciprocal nature of the ECT obligations, the fact that some of the parties to this treaty may extinguish the *sunset clause* in their relations would not have significant consequences on the fulfilment of the object and purpose of the ECT as a whole. Arguing the opposite would unreasonably frustrate the flexibility element inherent to Art. 41 VCLT and its conditions.

9. Conclusion

The arguments in favour of the lawfulness of an *inter se* modification affecting the *sunset clause* provided appear persuasive from a treaty law perspective. Investment tribunals, of course, may disagree. The *BayWa v. Spain* tribunal discussed in hypothetical terms the argument that EU treaties may be framed as an *inter se* modification of the ECT. The tribunal stated that

«[i]t is very doubtful whether the abrogation *inter se* of the ECT as between EU Member States is compatible 'with the effective execution of the object and purpose of the [ECT] as a whole'. Art. 16 of the ECT suggests that it is not, since it evinces an intent, even as between treaties on the same subject matter, to preserve the rights of investors and investments, which constitute a major plank of that multilateral treaty»⁶⁵.

It is reasonable to expect that Art. 16 could serve as an argumentative lever to deny the lawfulness of any *inter se* modification of the ECT. How-

⁶⁴ *Ibid.* For a more stringent view, see M. VILLIGER, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, cit., p. 535. Referring to the ECT, also T. MORGANDI, L. BARTELS, *Exiting the Energy Charter Treaty under the Law of Treaties*, cit., apply a less permissive approach. Jan Klabbbers instead takes the approach also expressed here. He argues: «[T]he states now announcing their withdrawal [from the ECT] could *inter se* decide to deactivate the sunset clause in relations between them: it is precisely the bilateralist assumption underlying the ECT which enables this. The bilateralist assumption relates to this: relations under the ECT (as under many, but not all, multilateral treaties) can often be analyzed in terms of pairs (or dyads) of parties – the multilateral ECT in reality reflects bundles of bilateral relations». See J. KLABBERS, *A Moral Holiday: Withdrawal from the Energy Charter Treaty*, cit.

⁶⁵ See ICSID, decision on jurisdiction, liability and directions on quantum of 2 December 2019, Case No. ARB/15/16, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, para. 276.

ever, Art. 41(2) VCLT may be very helpful in dispelling any ambiguity on the intentions of the parties concerning modifications. This rule requires the notification of the negotiation of these types of agreements. Such a procedural obligation provides a clear solution to the question of the legitimacy of the *inter se* agreement. As mentioned above⁶⁶, if the other parties to the ECT do not contest the intention to modify the treaty, the parties to the *inter se* agreement may rely on that silence as acquiescence⁶⁷, and this would represent arguably conclusive evidence of the admissibility of such an agreement before investment tribunals.

Finally, a more fundamental objection may arise in future arbitral proceedings. Indeed, whereas the ECT allows foreign investors to directly sue states for alleged violation of its provisions under its Art. 26, one might doubt that the 'pure' treaty-law approach presented here takes into due consideration investors' expectations of legal stability. Some doctrine suggests that once established, certain conditions set out by an investment agreement cannot be modified by its State parties, as this would affect the 'acquired' or 'vested' rights of investors⁶⁸.

⁶⁶ *Supra* para. 4.

⁶⁷ For an overview of the topic, see D. AZARIA, *State Silence as Acceptance: A Presumption and an Exception*, in *British Yearbook of International Law*, 2024, p. 1 ff.

⁶⁸ The debate on 'acquired rights' in international law was among the elements of the 'battle for international law' during decolonisation. See M. CRAVEN, *Colonial Fragments: Decolonization, Concessions, and Acquired Rights* in J. VON BERNSTORFF, P. DANN (eds) *The Battle for International Law: South-North Perspectives on the Decolonization Era*, Oxford, 2019, p. 101 ff. The category of 'acquired rights' may be understandably invoked regarding third states' (and not individuals') rights under Arts 37(2) and 70 VCLT. See F. BORDIN, *Reasserting Control through Withdrawal from Investment Agreements. What Role for the Law of Treaties?*, in A. KULICK (ed.), *Reassertion of Control over the Investment Treaty Regime*, Cambridge, p. 215-217. Outside the law of treaties, the 'principle of acquired rights' might have some limited relevance only in two situations. First, in the field of human rights. As famously argued by the Human Rights Committee, «[O]nce the people are accorded the protection of the rights under the [International Covenant on the Protection of Civil and Political Rights (ICCPR)], such protection devolves with territory and continues to belong to them» (CCPR General Comment No. 26: Continuity of Obligations, 8 December 1997, CCPR/C/21/Rev.1/Add.8/Rev.1). However, state practice shows that human rights can actually be revoked, without prejudice, of course, to customary international law. See e.g. E. KLEIN, *Denunciation of Human Rights Treaties and the Principle of Reciprocity*, in U. FASTERNRATH, R. GEIGER, D.-E. KHAN, A. PAULUS, S. VON SCHORLEMER, C. VEDDER (eds) *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma*, Oxford, 2011, p. 477 ff. Second, 'acquired rights' have been often invoked in the context of employment relations in international organisations (see C.F. AMERASINGHE, *The Law of the International Civil Service: As Applied by International Administrative Tribunals*, Oxford, 1994, p. 402-438; G. ULLRICH, *The Law of the International Civil Service: Institutional Law and Practice in International*

References to «general notions of acquired rights under international law»⁶⁹ or even to the «fundamental principle of acquired rights»⁷⁰ can be sporadically found in the reasoning of arbitral tribunals. Years of costly disputes over the 'post-termination' applicability of the ECT might materialise, irrespectively of the procedure adopted by its parties to 'neutralise' the sunset clause.

However, at least from the prism of international law, the issue of investors' (acquired) rights in itself seems irrelevant. Any juridical position created by the parties to a treaty can *always* be amended and extinguished by its parties. Any individual or non-state actor enjoying or holding these rights does not participate in this process⁷¹. This might be well subjectively perceived as *fair* or *unfair* but represents the rather axiomatic state of international law.

In conclusion, there are good arguments to defend a proper *inter se* modification of the ECT. Such an agreement could abrogate the sunset clause provided in Art. 47(3) ECT and pave the way to a 'safe' withdrawal.

Organisations, Berlin, 2018, p. 202-209) and in relation to the legal positions acquired by investors based on the domestic law of the host state (e.g. *Saudi Arabia v Arabian American Oil Company (Aramco)*, International Law Report, 1963, p. 117 ff.). This means that, if a principle on the protection of 'acquired rights' exists under international law – and this remains of course debated – it relates specifically to contractual rights and not to those eventually conferred by treaties. In other terms, this alleged general principle of law does not affect the law of treaties. See also C. CHINKIN, *Third Parties in International Law*, Oxford, 1993, p. 121-122. For debates, see F. LAVOPA, L.E. BARREIROS, M.V. BRUNO, *How to Kill a BIT and not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties*, in *Journal of International Economic Law*, 2013, p. 888 ff.; T. VOON, A. MITCHELL, J. MUNRO, *Partying Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights*, in *ICSID Review* 2014, p. 451 ff.; L. MAROTTI, *Aspetti problematici dell'accordo sull'estinzione dei trattati bilaterali di investimento tra Stati Membri dell'Unione Europea*, in *Rivista di diritto internazionale privato e processuale*, 2020, p. 853; A. REINISCH, S. MANSOUR FALLAH, *Post-Termination Responsibility of States? – The Impact of Amendment/Modification, Suspension and Termination of Investment Treaties on (Vested) Rights of Investors*, in *ICSID Review*, 2022, p. 101 ff.

⁶⁹ ICSID, decision on termination request and intra-EU objection of 7 May 2019, case no. ARB/15/50, *Eskosol S.p.A. in liquidazione v. Italian Republic*, para. 226.

⁷⁰ PCA, final award of 11 May 2020, case no. 2017-15, *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, para. 338.

⁷¹ In the words of James Crawford: «[i]t is too often forgotten that the parties to a treaty, that is, the states which are bound by it at the relevant time, own the treaty. It is their treaty. It is not anyone else's treaty. In the context of investment treaty arbitration there is a certain tendency to believe that investors own bilateral investment treaties, not the state parties to them. (...) That is not what international law says». J. CRAWFORD, *A Consensualist Interpretation of Article 31 (3) of the Vienna Convention on the Law of Treaties*, in G. NOLTE (ed.), *Treaties and Subsequent Practice*, Oxford, 2013, p. 31.

However, the first step to test these arguments, especially in future legal disputes before investment tribunals, would be not questioning the (few) legal categories of the law of treaties that do not generate irresolvable argumentative struggles⁷². These include the idea that a ‘subsequent agreement’ interpreting a multilateral treaty cannot be possibly concluded by certain parties only. In other terms, if the European Commission aims to solve the sunset clause conundrum, it should readjust its exit strategy.

⁷² For reflections on the main conceptual tensions underpinning the law of treaties, see E. CANNIZZARO, *The Law of Treaties through the Interplay of its Different Sources*; in C. TAMS, A. TZANAKOPOULOS, AND A. ZIMMERMANN (eds.) *Research Handbook on the Law of Treaties*, 2014, p. 16 ff.; A. RASULOV, *Theorizing Treaties: The Consequences of the Contractual Analogy* in A. TZANAKOPOULOS, AND A. ZIMMERMANN (eds.) *Research Handbook on the Law of Treaties*, cit., p. 74 ff.