The Energy Charter Treaty at a Tipping Point – Modernization Efforts, Withdrawal Plans and their Legal Consequences

Philipp Kehl & Sebastian Wuschka*

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* Philipp Kehl is a PhD candidate at Bucerius Law School and a research assistant at GvW Graf von Westphalen in Hamburg (Germany); Email: philipp.kehl@law-school.de. Sebastian Wuschka is an of counsel with the Complex Disputes team at Luther Rechtsanwaltsgesellschaft mbH in Hamburg (Germany) and a research fellow at the University of Lausanne (Switzerland); Email: sebastian.wuschka@luther-lawfirm.com. The authors thank Nicolas Krotten and Lina Tölle for their valuable assistance in finalizing the manuscript. The opinions expressed in this article are those of the authors. They do not necessarily reflect the opinions or views of the law firms they are affiliated with or the firms' clients.

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Abstract

Driven to a large extent by the EU Commission, a modernization process for the Energy Charter Treaty (ECT) has been underway since 2017. While an agreement in principle (AIP) was reached in 2022, that agreement's adoption and with it the modernization process was put on hold after the EU and its member states could not align their positions. Instead, several states – amongst them France, Germany and Poland – moved to withdraw from the treaty, followed by calls from the European Parliament and then also the EU Commission for the EU and all its member states to follow suit. These developments have left the ECT in a limbo state, with the future of the modernization process and the treaty in general now being highly uncertain. Against this background, this article analyzes the legal implications of the ECT modernization efforts and specifically the effects of the AIP, should it still enter into force. It further addresses the consequences that would follow from the realization of the current withdrawal plans, as well as their interactions with the modernization process.

Keywords: Energy Charter Treaty, Komstroy, ECT Modernization, EU Investment Policy, Intra-EU Investment Disputes

A. Introduction

The *Energy Charter Treaty* (ECT)[1] is best known for its investment protection framework. Indeed, it is the most used basis for investment claims presently and generally.[2] Over the last few years, the ECT and its investment protection framework also have received an unprecedented amount of attention. Civil society organizations have launched several campaigns calling for the ECT contracting parties to terminate the treaty, which they consider "an axe to climate action"[3] and a "climate killer"[4]. This perception stands in stark contrast to statistics of the Energy Charter Secretariat (ECT Secretariat), according to which most ECT-based arbitrations re-

1 The Energy Charter Treaty (signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95.

2 According to UNCTAD data, the ECT has been the basis of 106 investment cases out of 697 known ones initiated during the period 2011–2020; *UNCTAD*, Investor–State Dispute Settlement Cases: Facts and Figures 2020, IIA Issues Note, Issue No. 4 (September 2021), p. 3, available at: https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf (21/12/2023).

3 *Dauphin and others*, The Energy Charter Treaty: an axe to climate action – 10 reasons the EU and governments must quit the Energy Charter Treaty (Friends of Earth Europe, May 2020), available at: https://friendsoftheearth.eu/publication/the-energy-charter-treaty-an-axe-to-climate-action/ (21/12/2023).

4 *Dauphin*, The unknown climate-killer deal we'll have to tackle next (Friends of Earth Europe, May 2020), available at: https://friendsoftheearth.eu/news/the-unknown-climate-killer-deal-well-have-to-tackle-next (21/12/2023).

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late to investments in renewables.[5] Still, also some posts on legal blogs have endorsed the calls for termination.[6]

Further, on a more technical level, a need has arisen for the European Union (EU) and its member states to tackle the question of intra-EU investment arbitration under the ECT. While such arbitrations between an investor from one EU member state and another EU member state had been subject to heated debates for quite some time,[7] the European Court of Justice (ECJ) eventually declared them incompatible with EU law in its *Komstroy* judgment.[8]

The contracting parties to the ECT had initiated formal discussions about a modernization of the treaty already in 2017, with the European Commission as one of the driving forces behind this process. As the Commission's 2019 negotiation directives set out, "the Modernised ECT should […] facilitate investment in the energy sector in a sustainable way between the ECT Contracting Parties by creating a coherent and up-to-date legally binding framework that provides for legal certainty and ensures a high level of investment protection" and, in particular, "reflect climate change and clean energy transition goals and contribute to the achievement of the objectives of the Paris Agreement."[9] The issue of intra-EU investment arbitration was equally to be addressed in this process.

In mid-2022, an agreement in principle (hereinafter: the AIP) was reached and illustrated in a communication by the ECT Secretariat.[10] Shortly thereafter, the detailed text of this agreement[11] was leaked.[12] The ECT contracting parties were originally scheduled to adopt the AIP on 22 November 2022. Yet, the European Commission requested to have the agreement's adoption rescheduled for the Energy Charter Conference's April 2023 meeting, which ultimately did not occur either.

5 *Energy Charter Secretariat*, Statistics of ECT Cases as of 1 May 2023, p. 3, available at: https://www.energycharter.org/fileadmin/DocumentsMedia/Disputes/20230501_-_Statistics_-_Cases_under_the_Energy_Charter_Treaty.pdf (21/12/2023).
6 See for example *Müller-Hoff/Duarte*, Don't Stick to a Fossil Treaty – Pull the Plug on the Energy Charter Treaty, Völkerrechtsblog, 31 January 2022, available at: https://voelkerrechtsblog.org/dont-stick-to-a-fossil-treaty-pull-the-plug-on-the-energy-charter-treaty/ (21/12/2023); *Schaugg/Nair*, The Reform That Isn't, Verfassungsblog, 18 November 2022, available at: https://verfassungsblog.de/the-reform-that-isnt/ (21/12/2023).
7 For further details, see *Happ/Wuschka*, in: Kröll/Bjorklund/Ferrari (eds.), p. 2006.
8 CJEU, case C-741/19, *Republic of Moldova v. Komstroy*, ECLI:EU:C:2021:655, para. 66.
9 *Council of the European Union*, Negotiating Directives for the Modernisation of the Energy Charter Treaty, doc. 10745/19 ADD 1.
10 *Energy Charter Secretariat*, Decision of the Energy Charter Conference. Subject: Public Communication Explaining the Main Changes Contained in the Agreement in Principle, CCDEC 2022 10 GEN, 24 June 2022. As set out in the Communication, the draft text of the amended ECT was to be communicated to the Contracting Parties by 22 August 2022 for adoption by the Energy Charter Conference on 22 November 2022.
11 *Energy Charter Secretariat*, Agreement in Principle on the Modernisation of the Energy Charter Treaty, CC 750 Rev, 24 June 2022, available at: www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf (21/12/2023).
12 Responsible for the leak was the American daily newspaper "Politico", see *IISD*, Newly Released Text for Modernized Energy Charter Treaty Shows Too Many Potential Obstacles for Climate Action (13 September 2022), available at: https://www.iisd.org/articles/statement/newly-released-text-modernized-energy-charter-treaty (21/12/2023).

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A certain number of EU member states had announced their intention to withdraw from the ECT in fall of 2022, and the EU Council failed to approve the AIP for the modernized ECT only a few days before the ECT contracting parties were meant to vote on it.[13]

As the EU and its member states represent roughly half of the ECT's membership, their position has a significant impact on the treaty's fate. The European Parliament called for a coordinated exit of all EU member states from the ECT on 24 November 2022.[14] France, Germany, and Poland then submitted their notifications of withdrawal to the ECT's depositary, Portugal, in December 2022, which all became effective before the end of 2023.[15] Luxembourg submitted its notification on 16 June 2023.[16]. Further actions by other EU member states are to be expected but remain unclear for now. As a major development, however, also the EU Commission joined the call for a coordinated withdrawal of the EU and its member states in early February 2023,[17] after having advocated for the ECT's modernization until that point.

On the other side of the spectrum, looking at non-EU ECT member states, Switzerland already announced that it would not follow suit but remain party to the ECT instead.[18] Also, the ECT Secretary General responded to the European Parliament's call for the EU to exit the ECT with an open letter of 13 February 2023,[19]

13 This, in turn, was celebrated by the ECT's critics. See e.g. *ClientEarth*, EU rejection of reformed Energy Charter Treaty 'historic moment' for climate action (21 November 2022), available at: https://www.clientearth.org/latest/press-office/press/eu-rejection-of-reformed-energy-charter-treaty-historic-moment-for-climate-action/ (21/12/2023).

14 *European Parliament*, Resolution on the outcome of the modernisation of the Energy Charter Treaty, 2022/2934(RSP).

15 *Energy Charter Secretariat*, Written notifications of withdrawal from the Energy Charter Treaty, 22 March 2023, available at: https://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty (21/12/2023); for France, the date of cessation of the ECT membership was determined to be 8 December 2023, for Germany 20 December 2023 and for Poland 29 December 2023.

16 *Energy Charter Secretariat*, Written notification of withdrawal from the Energy Charter Treaty, 30 August 2023, available at: https://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/ (16/12/2023); the withdrawal would take effect on 17 June 2024, accordingly.

17 *European Commission*, Non-paper on the Next steps as regards the EU, Euratom and Member States' membership in the Energy Charter Treaty, available at: https://www.euractiv.com/wp-content/uploads/sites/2/2023/02/Non-paper_ECT_nextsteps.pdf (21/12/2023).

18 *Lo*, Switzerland says won't follow EU out of beleaguered Energy Charter Treaty (Euractiv, 10 February 2023), available at: https://www.euractiv.com/section/energy/news/switzerland-says-wont-follow-eu-out-of-beleaguered-energy-charter-treaty/ (21/12/2023).

19 *ECT Secretary General*, Letter to the President of the European Parliament, SG/23/E/0047, 13 February 2023. This call was reiterated after the EU Commission adopted a draft Council Decision proposing the withdrawal of the European Union from the ECT, see *ECT Secretary General*, Statement on the draft Council Decision proposing the withdrawal of the European Union from the Energy Charter Treaty, 11 July 2023, available at: https://www.energycharter.org/media/news/article/statement-by-the-secretary-general-of-the-energy-charter-secretariat-on-the-draft-council-decision-p/ (21/12/2023).

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calling for a potential withdrawal from the ECT to be conducted separately from the modernization process.

These developments have left the ECT in a limbo state, with the future of the modernization process and the treaty in general now being highly uncertain. Against this background, this article analyzes the legal implications of the ECT modernization efforts and specifically the effects of the AIP, should it enter into force. We further address the consequences that would follow from the realization of the current withdrawal plans, as well as their interactions with the modernization process. We will first give a more detailed overview of the ECT modernization process, the content of the AIP and the withdrawal plans (B.), before providing an in-depth analysis of the different facets of their legal ramifications (C.) and turning to brief conclusions (D.).

B. Current Developments

I. The ECT Modernization Process

As set out above, one of the main goals of the ECT modernization process was to amend the treaty to further sustainable investment in the energy sector with a particular view to clean energy transition goals and the achievement of the Paris Agreement's objectives. In line with these goals, the ECT membership agreed on several amendments to the treaty. These also include significant changes to its investment protection provisions.

In that respect, the probably most noteworthy changes the AIP foresees include an amendment to the ECT's definitions and a "flexibility mechanism" that allows contracting parties to unilaterally exclude fossil fuels from the ECT's protections in their territories. As the ECT Secretariat's Communication already sets out,

> the EU and the UK have opted to carve-out fossil fuel related investments from investment protection under the ECT, including for existing investments after 10 years from the entry into force of the relevant provisions and for new investments made after 15 August 2023 as of that date with limited exceptions.[20]

As an additional temporal limit, no fossil fuel related investments would enjoy protection under the modernized ECT after 31 December 2040, regardless of the date of the AIP's entry into force.[21] The "limited exceptions" mentioned in the ECT Secretariat's communication refer to new investments in gas power plants which allow for the use of renewable gases in addition to petroleum gases and emit less than 380 g of CO2 per kWh of electricity produced. Such investments would be protect-

20 *Energy Charter Secretariat*, Decision of the Energy Charter Conference (n 10), p. 3 (emphasis added).

21 See Annex NI, Section B, paragraph 1, subparagraph (b), Section C, paragraph 1 AIP (n 11).

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ed even after 15 August 2023 under the modernized ECT as envisioned by the AIP.[22]

Secondly, the AIP foresees a refinement of the ECT's specific investment protection provisions, stressing the contracting parties' right to regulate, and ultimately offering more restricted protection to foreign investors. Specifically, the definition of a qualifying "investor" and a qualifying "investment" under the ECT are intended to be narrower.[23] In relation to Article 10(1) ECT, the fair and equitable treatment (FET) standard, the AIP follows the model adopted in the EU's further investment agreements,[24] setting out an exhaustive list of measures that would constitute FET violations.[25] Moreover, while the AIP recognizes that indirect expropriations are compensable, it stipulates that non-discriminatory measures by which a state pursues legitimate policy objectives like environmental protection can constitute indirect expropriations only under exceptional circumstances.[26] Regarding the standard of most constant protection and security as currently enshrined in Article 10(1)(3) ECT, the AIP replaces it with the more commonly used term of "full protection and security", while also stipulating that only physical security is guaranteed thereunder.[27] The AIP also contains a refined umbrella clause, which only applies to specific written commitments by contracting parties in the exercise of governmental authority.[28]

Thirdly, in relation to the EU's push to exclude intra-EU investment arbitration from the ECT, the AIP includes a new article according to which certain provisions

22 Annex NI, Section B, paragraph 1, subparagraph (b) AIP (n 11); this protection would generally expire on 31 December 2030, except for investments in gas power plants made to replace existing power generation from fossil fuels, which would, like the protection for investments made before 15 August 2023, expire on 31 December 2040 but no later than 10 years after the entry into force of the modernized ECT.

23 Art. 1(7) AIP (n 11) would require that a natural person must not have the nationality of the state they invested in and that a legal person carries out "substantial business activities" in the state under the laws of which it is constituted to qualify as an investor under the ECT, respectively; Art. 1(6) AIP would now explicitly set out multiple criteria an asset has to fulfill to be protected under the ECT, such as legality under the laws of the host state.

24 See e.g. Article 8.10 of the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States, OJEU L 11, 14 January 2017, p. 23.

25 Art. 10(2) AIP (n 11); the same article of the EU proposal for a modernized ECT also provided for an exhaustive list from which the version contained in the AIP differs insofar as it also includes frustrations of legitimate expectations into the scope of FET, see *European Union*, EU text proposal for the modernisation of the Energy Charter Treaty (ECT), available at: https://ccsi.columbia.edu/sites/default/files/content/docs/tradoc_158754%20(1)_0.pdf (21/12/2023).

26 Art. 10(4) AIP (n 11).

27 Art. 10(1), (3) AIP (n 11); this is likely owed to the perception that the expression "most constant protection and security" is stronger and more far-reaching than the expression "full protection and security" (ICSID, case No. ARB/87/3, *AAPL v. Sri Lanka*, Final Award of 27 June 1990, para. 47) and, more specifically, that it also guarantees legal security and not only physical security (cf. *Schreuer*, Journal of International Dispute Settlement 2010/2, pp. 358–359).

28 Art. 10(13) AIP (n 11).

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of the ECT, including Article 26 (which provides for investor-state dispute settlement) "shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation in their mutual relations". As already the ECT Secretariat's Communication stated, the EU is currently the only Regional Economic Integration Organization (REIO) among the contracting parties.[29]

In that respect, the AIP would also remove Article 16, which, under the ECT as it currently stands, gives preference to the provisions more favorable to investors in cases of conflict with other investment protection treaties, entirely and without replacement from the treaty.[30] This provision had been considered decisive in numerous investment tribunals' decisions dismissing arguments that EU law would render them without jurisdiction under the ECT (as further discussed below in Section C.2.b)).

II. The Withdrawal Plans

While the European Commission's approach towards the ECT until its change of course in February 2023 clearly was to follow through with the modernization, the EU member states developed different positions over the course of fall 2022. Following in Italy's footsteps, which had notified its withdrawal from the ECT already at the end of 2014, Poland was the first member state to openly take issue with the results of the modernization process as reflected in the AIP. On 25 August 2022, the Polish government presented a draft bill[31]to the state's lower chamber, the Sejm, foreshadowing the country's withdrawal.[32] Instead of climate considerations, the Polish government appears to have been more troubled by the ECT's perceived continued incompatibility with EU law also under the new version, the costs it would face as a respondent in investment disputes, general systemic concerns relating to investment arbitration,[33] and the general possibility of external arbitral and

29 *Energy Charter Secretariat* (n 10), p. 7; while *EURATOM* technically remains a member, it has effectively been represented by the European Union since the entry into force of the Treaty of Lisbon, and by the European Economic Community before. Consequently, the *United Nations Treaty Collection (UNTC)* only lists the "European Communities" as a participant to the treaty, instead of mentioning both organizations separately, see https://treaties.un.org/Pages/showDetails.aspx?objid=080000028009ac15 (21/12/2023).

30 P. 47 of the Annex containing the AIP (n 11).

31 *Sejm of the Republic of Poland*, Government bill on termination of the Energy Charter Treaty and the Energy Charter Protocol on Energy Efficiency and Relevant Environmental Aspects, done in Lisbon on 17 December 1994 (25 August 2022), available at: www.sejm.gov.pl/sejm9.nsf/druk.xsp?nr=2553 (21/12/2023).

32 For an analysis of the rationale behind the draft bill, see *Daszko*, No Longer Feeling the Energy – Unpacking Poland's reasoning behind its decision to withdraw from the ECT, Verfassungsblog, 9 September 2022, available at: https://verfassungsblog.de/not-feeling-the-energy-anymore/ (21/12/2023); *Sadowski*, Poland to Withdraw from the ECT: Who Does It Benefit?, Kluwer Arbitration Blog, 25 September 2022, available at: https://arbitrationblog.kluwerarbitration.com/2022/09/27/poland-to-withdraw-from-the-ect-who-does-it-benefit/ (21/12/2023).

33 Cf. *Daszko* (n 32).

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judicial scrutiny.[34] In what can only be described as a pattern of uncoordinated announcements, Spain[35], the Netherlands[36], France[37], Belgium[38], Slovenia[39], Germany[40], Luxembourg[41], Denmark[42] and, most recently, Portugal[43], followed suit by proclaiming their own withdrawal plans. The United Kingdom declared that it would conduct a review of its ECT membership, with withdrawal being an option in case the modernization process fails.[44]

For now, as noted in the introduction, France, Germany, Poland and Luxembourg appear to be the only countries that formally notified their withdrawal to the ECT's depository. The coordinated withdrawal which the European Parliament called for in November of 2022 – and which the EU Commission now endorses – is presently not in sight. The only step in that direction taken since the initial calls for a coordinated withdrawal was a proposal for a Council Decision adopted by the EU Commission in July 2023.[45] These calls by the European Commission and Parliament are not legally binding. Even if the EU Council were to join them in demanding that the member states withdraw from the ECT, the question arises (which this

34 Cf. *Sadowski* (n 32).
35 *Fisher*, Spain announces withdrawal from ECT (Global Arbitration Review, 13 October 2022), available at: https://globalarbitrationreview.com/article/spain-announces-withdrawal-ect (21/12/2023).
36 *Fisher*, Netherlands moves to quit Energy Charter Treaty (Global Arbitration Review, 19 October 2022), available at: https://globalarbitrationreview.com/article/netherlands-moves-quit-energy-charter-treaty (21/12/2023).
37 *Fisher*, France joins rush to exit ECT (Global Arbitration Review, 24 October 2022), available at: https://globalarbitrationreview.com/article/france-joins-rush-exit-ect (21/12/2023).
38 *Belga News Agency*, Belgian Climate Minister wants to withdraw from Energy Charter Treaty (24 October 2022), available at: https://www.belganewsagency.eu/belgian-climate-minister-wants-to-withdraw-from-energy-charter-treaty (21/12/2023). It is, however, questionable whether this statement accurately reflects the position of the Belgian government, as no further information on Belgian withdrawal plans is available.
39 *Fisher*, Slovenia joins European exodus from ECT (Global Arbitration Review, 10 November 2022), available at: https://globalarbitrationreview.com/article/slovenia-joins-european-exodus-ect (21/12/2023).
40 *Moens*, Germany to leave Energy Charter Treaty (Politico, 11 November 2022), available at: https://www.politico.eu/article/germany-to-leave-energy-charter-treaty/ (21/12/2023).
41 *Ballantyne*, Luxembourg at ECT exit door (Global Arbitration Review, 18 November 2022), available at: https://globalarbitrationreview.com/article/luxembourg-ect-exit-door (21/12/2023).
42 *Szumski*, Denmark to withdraw from Energy Charter Treaty (EURACTIV, 14 April 2023), available at: https://www.euractiv.com/section/politics/news/denmark-to-withdraw-from-the-energy-charter-treaty/ (21/12/2023).
43 *Fisher*, Portugal considers ECT withdrawal (Global Arbitration Review, 21 July 2023), available at: https://globalarbitrationreview.com/article/portugal-considers-ect-withdrawal (21/12/2023).
44 *UK Department for Energy Security and Net Zero*, Press release: UK reviewing membership of energy treaty (1 September 2023), available at: https://www.gov.uk/government/news/uk-reviewing-membership-of-energy-treaty (21/12/2023).
45 *European Commission*, Proposal for a Council Decision on the withdrawal of the Union from the Energy Charter Treaty, COM(2023) 447 final.

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article cannot address) whether the member states would have to follow suit or whether those willing to could – from the EU law perspective – remain ECT contracting parties.

Nevertheless, considering the doubts voiced by several EU member states and the Commission's call for the EU and its member states to leave the treaty, it is by far not clear that there will be sufficient political support for the AIP as it presently stands. In that respect, Article 36(1) ECT presents a first legal obstacle for the adoption of the AIP. Under that provision, "[u]nanimity of the Contracting Parties Present and Voting at the meeting of the Charter Conference" is required for treaty amendments to be adopted.[46] Even in case of adoption, amendments only enter into force ninety days after ratification by ¾ of the ECT contracting parties under Article 42(4) ECT.

As the EU and its member states form a majority of the ECT contracting parties, sufficient opposition within the block could put the modernization process to an end (at least as long as their status as contracting parties lasts). In fact, it would already be sufficient for one of them to oppose the adoption of the AIP. Further, even if most EU member states after all decided to opt for the adoption of the modernized ECT and the skeptical ones – including those from outside the EU – abstained from voting at the relevant meeting, the ratification process would certainly not be a smooth one. Political pressure and opposition by civil society actors will persist, making it appear likely that the necessary quorum of ratifications will only be reached in 2025 or even later, if at all.

C. Legal Ramifications

Against this political background and the corresponding uncertainties, two main legal issues arise: The first is which consequences follow from the withdrawal from the ECT of some and potentially all EU member states, as well as the EU itself and EURATOM, for the modernization efforts and for their treaty commitments (I). The second is which implications an implementation of the modernized ECT between certain parties only, even though this would need to be at least ¾ of the ECT's membership, would have (II.).

I. The implications of a withdrawal by certain states

The EU Commission's and EU member states' withdrawal plans will bring about at least two different sets of consequences, if followed through: On the one hand, for those states that remain committed to the ECT, the question arises whether an exodus of some or all members states of the EU would still allow for the modernization to proceed (1.). On the other hand, there are specific issues related to the withdrawal for the withdrawing states. These include, most importantly, how the withdraw-

46 Cf. *Hobér*, p. 502 for a definition of "unanimity" in contrast to "consensus".

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ing members would foresee to approach the ECT's continued application for 20 years under its sunset clause (2.), given that there are already calls to "neutralize"[47] it. We address these in turn, before drawing some preliminary conclusions (3.).

1. Impact of the withdrawal plans on the modernization process

The most notable consequence of a withdrawal of several member states from the ECT would likely be the role the withdrawing members would play in relation to the voting process for the modernized ECT's adoption. As already noted, Article 36(1) lit. a of the ECT requires "unanimity" among the contracting parties present and voting for an amendment to be adopted, while such an amendment will take effect ninety days after its ratification by ¾ of the ECT membership under Article 42(4) ECT. Both clauses use the term "Contracting Parties" when referring to the actors relevant for adoption and ratification of an amendment.[48] A "Contracting Party" is defined in Article 1(2) ECT as "a state or Regional Economic Integration Organisation which has consented to be bound by this Treaty and for which the Treaty is in force".[49] A withdrawal, conversely, takes effect one year after the notification of withdrawal has been received by the ECT's depository, Portugal, under Article 47(2). After that time, the ECT ceases to be in force for a state that has effectively terminated its membership, and such a state loses its "Contracting Party" status.[50]

During that one-year period for which withdrawing states remain contracting parties, however, their voting behavior will necessarily play a role for the quora of Articles 36(1) lit. a and 42(4) ECT, and therefore in particular for the adoption of the AIP. Yet, the withdrawing members could always make use of the possibility not to participate in the relevant vote to not derail the modernization process.[51] Indeed, it would be a politically odd behavior for the EU and its member states not to support the other member states in completing the ECT's modernization, even when they are exiting the treaty. The only coherent policy approach would be to abstain from voting or supporting the adoption of the AIP.

Consequently, unless the EU or certain of its member states reveal themselves as even more of an irrational actor, their withdrawal from the ECT should not put an end to the modernization efforts for the remaining states. Instead, under Article

47 *Simon*, Legal expert: ECT withdrawal 'is the only possible course of action' (EURACTIV, 8 February 2023), available at: https://www.euractiv.com/section/energy/interview/legal-expert-ect-withdrawal-is-the-only-possible-course-of-action/(21/12/2023).

48 *Hobér*, pp. 502, 512.

49 The distinction drawn by the text of this definition between "consent[...] to be bound" and the condition that the "[t]reaty is in force" highlights that these are two separate conditions, which a state must fulfill cumulatively to acquire the status of a "Contracting Party", see PCA, Case No. 2005-04/AA227, UNCITRAL, *Yukos (Isle of Man) v. Russia*, Interim Award on Jurisdiction and Admissibility of 30 November 2009, para. 385.

50 Cf. *Hobér*, p. 61; *Geraets/Reins*, in: Leal-Arcas (ed.), Art. 1 ECT, para. 1.11

51 See also *ECT Secretary General*, Letter to the President of the European Parliament (n 19), p. 3.

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42(4) ECT, the amendments to the treaty would "enter into force *between Contracting Parties having ratified, accepted or approved them*". In turn, under the general rule of international law provided for in Articles 40(4) and 30(4) lit. b of the Vienna Convention on the Law of Treaties (VCLT) and also reflected by Article 42(4) ECT, the relationship between those treaty parties that may have ratified the modernized ECT and those which have not will remain governed by the pre-existing regime – in this case, the "old ECT". What remains to be seen, however, is whether the remaining states themselves retain their appetite for the ECT's modernization, given that these efforts were mainly driven by the EU.

2. Withdrawal and the sunset clause dilemma

The more intricate legal questions relate to the withdrawing states' approach to putting an end to their ECT obligations, and especially to eliminate the implications of the ECT's sunset clause. Article 47(3) ECT provides:

> 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.

Under this clause, the full effect of a withdrawal from the ECT would be deferred by 20 years. Ironically, even though the states' intention of leaving the ECT is to exit a legal framework that is perceived as an obstacle to climate action, their withdrawal would perpetuate the allegedly problematic situation beyond the time at which the modernized treaty could enter into force. It appears that those states which already have outlined their concrete withdrawal plans also accept this legal position. The Polish government's draft bill acknowledges the sunset clause's effect but appears to have been motivated more by the intention to exclude future investments from the ECT's protection.[52] France also appears to recognize that its definitive exit from the ECT might not be soon accomplished.[53]

For the states now pursuing withdrawal in light of climate concerns, a possible way to at least mitigate the effect of the sunset clause would have been to join the AIP instead and to use its flexibility mechanism.[54] This would have allowed them to avoid being bound by the ECT's investment protection regime insofar as (most) future fossil fuel investments are concerned, while investments already made would only have enjoyed a further ten years of ECT protection, instead of the 20 years

52 Cf. *Daszko* (n 32); *Sadowski* (n 32).

53 *Malingre*, La France concrétise son retrait du traité sur la charte de l'énergie (Le Monde, 19 December 2022), available at: www.lemonde.fr/planete/article/2022/12/19/la-france-concretise-son-retrait-du-traite-sur-la-charte-de-l-energie_6155047_3244.html (21/12/2023).

54 See also *ECT Secretary General*, Letter to the President of the European Parliament (n 19), p. 3.

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provided by the sunset clause.[55] Naturally, however, this would have required an entry into force of the modernized treaty as such for the relevant states, and hence their continued membership until such time, since only contracting parties can ratify amendments.[56]

Considering the decision by France, Germany, Poland and Luxembourg not to take this step, and the EU Commission's as well as civil society organizations' call for a neutralization of the sunset clause's effect, it is worthwhile addressing other ways in which the withdrawing states might seek to tackle their sunset clause dilemma: The (mutual) termination of sunset clauses to dodge a treaty's continued application has triggered academic and – to a lesser degree – practical debates for quite some time now.[57] In the following, we therefore review the suggested avenues to terminate the sunset clause separately from the ECT. We will be doing so by looking, first, at unilateral options for the withdrawing state (a)), before turning to multilateral approaches (b)).

a) Termination of the sunset clause?

As set out in greater detail by *Klabbers*, the law of treaties and the ECT itself do not generally offer a possibility to terminate the ECT' sunset clause separately from the treaty as such.[58] Indeed, it is the very function of the sunset clause, in particular against the long-term stability needed and envisaged for energy investments at the time of the ECT's conclusion,[59] to create a durable regime of investment protection that outlives the treaty's end. The states withdrawing from the ECT would hence be left with potential justification of a unilateral withdrawal under Articles 60 (material breach by a Contracting Party), 61 (*force majeure*) and 62 (fundamental change of circumstances) of the VCLT[60], which could be used to release them from the regime under the sunset clause. Yet, presently there is no room to argue for a situation of a material breach or *force majeure*, leaving only the argument based on a fundamental

55 See above, II.a) for details on the AIP's flexibility mechanism.

56 See Art. 42(4)(2) ECT: "Amendments shall enter into force *between the contracting parties*"; Art. 42(4)(3) ECT: "Thereafter the amendments shall enter into force *for any other Contracting Party*". Consequently, scholarly literature does not even discuss the possibility of the ratification of an amendment by a state that has already withdrawn from the ECT and is under the effect of the sunset clause, cf. *Morelli*, in Leal-Arcas (ed.), Art. 42 ECT, para. 42.01 et seq.

57 For an overview, see *Nowrot*, in: Hindelang/Krajewski (eds.), p. 227; *Voon/Mitchell*, ICSID Review-FILJ 2016/2, p. 413.

58 *Klabbers*, A Moral Holiday: Withdrawal from the Energy Charter Treaty, 11(6) ESIL Reflections (2022), p. 4–5, available at: https://esil-sedi.eu/esil-reflection-a-moral-holiday-withdrawal-from-the-energy-charter-treaty/ (21/12/2023).

59 Ibid, p. 3.

60 Vienna Convention of the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

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change of circumstances under Article 62 VCLT[61]. This possibility, however, received some attention recently, especially in light of a communication by the ECT Secretariat on its website's news section.[62] In that communication, the Secretariat stressed the rule's application to exceptional cases only, and highlighted that it applies only to unforeseen changes of circumstances.[63]

And indeed, it appears hardly tenable to argue that the obligations under the ECT were radically transformed by new circumstances compared to the time of the treaty's conclusion. If a state attempted to rely on the need to combat climate change as a new circumstance, any such argument cannot surpass the high threshold of a lack of foreseeability under Article 62 VCLT,[64] which the International Law Commission (ILC) in any event "attempted to frame […] as restrictively as possible."[65] Moreover, already the ECT's preamble acknowledged this need, referencing the United Nations Convention on Climate Change.[66]

b) Derogation from the sunset clause by multilateral steps?

Consequently, of greater importance are those avenues under discussion which rely on a multilateral solution. States have developed quite a portfolio of approaches to dealing with sunset clauses in relation to the mutual termination of investment treaties, where some uncertainty exists whether or not such clauses actually apply (or different treaty wordings may lead to different results).[67] For instance, when terminating bilateral investment treaties, states have resorted to the "sleight of hand" of first amending the relevant treaty to remove its sunset clause and then terminating the treaty without the interference of the so removed clause.[68]

A debate already exists as to whether states, as the masters of their treaties, can simply extinguish the investors' rights under investment treaties by way of a treaty

61 Art. 62 VCLT also reflects customary international law, see ICJ, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, [1997] ICJ Rep 7, paras. 46, 99; ICJ, *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Jurisdiction of the Court, [1973] ICJ Rep 49, para. 36.

62 *Energy Charter Secretariat*, Sunset Clause (Article 47 of the ECT) in relation to Article 62 of the Vienna Convention on the Law of Treaties (VCLT), 3 November 2022, available at: 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/ (21/12/2023).

63 Ibid.

64 Cf. *Klabbers* (n 58), p. 6. For a different perspective on this question see *Daszko*, Journal of International Economic Law 2023/4, forthcoming, p. 12.

65 *Binder*, Leiden Journal of International Law 2012/4, pp. 909, 912.

66 Preamble of the ECT, recital 14.

67 Most recently on this, *Lauvaux*, Arbitration International 2022/3, pp. 203–212.

68 For instance, this is the practice adopted by the Czech Republic and its treaty partners. See *Peterson*, Czech Republic terminates investment treaties in such a way as to cast doubt on residual legal protection for existing investments (IA Reporter, 1 February 2011), available at: www.iareporter.com/articles/czech-republic-terminates-investment-treaties-in-such-a-way-as-to-cast-doubt-on-residual-legal-protection-for-existing-investments/ (21/12/2023).

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amendment anytime,[69] or whether certain principles protecting the acquired rights and interests of investors limit their control.[70] In relation to the ECT, the discussion would lead to the same questions if its entire membership agreed to remove the sunset clause, which appears highly unlikely. The need to remove the sunset clause in a group of ECT contracting parties *inter se*, for which also the EU Commission advocates in its non-paper,[71] raises again separate, yet similarly intricate questions.

An *inter se* agreement removing the sunset clause's application naturally would only apply among its parties.[72] It therefore would in any case not be capable of nullifying the sunset clause entirely. Whether a group of contracting parties could, however, remove the sunset clause's application among themselves is a question governed by Article 41 VCLT. Essentially, the same legal considerations come into play at this point as the ones relevant before multiple investment tribunals that already had to discuss whether EU member states would hypothetically have been entitled to exclude the ECT's application *intra* EU.[73]

Under Article 41 VCLT, where the treaty does not provide for the option to conclude *inter se* agreements (as the ECT does not), such agreements are only allowed under three cumulative conditions: the modification in question is not prohibited by the treaty, it does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations, and it does not relate to a provision from which a derogation is incompatible with the effective execution of the object and purpose of the treaty as a whole.[74]

While the VCLT's *traveaux preparatoires* appear to indicate that a prohibition within the meaning of Article 41 VCLT would need to be explicit,[75] several arbitral tribunals have at least considered an *inter se* agreement inadmissible where it would strip investors of the right to dispute settlement under Article 26 of the ECT. In *Vattenfall v. Germany*, for instance, the tribunal considered that Article 16 of the

69 Most prominently, *Crawford*, in: Nolte (ed.), pp. 29, 31: "it is too often forgotten that the parties to a treaty, that is, the states that 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 states parties to them … That is not what international law says." See also *Voon and others*, ICSID Review 2014/2, p. 451.

70 See for example ICSID, case No. ARB/17/27, *Magyar Farming v. Hungary*, Award of 13 November 2019, paras. 222–223, referring to "general principles of legal certainty and "res inter alios acta, aliis nec nocet prodest". See also below, C.II.2.c).

71 Non-paper from the European Commission (n 17), p. 6.

72 Ibid.

73 On these, *Happ/Wuschka*, in: Kröll/Bjorklund/Ferrari (eds.), pp. 2031 et seq. See also *Tropper*, Withdrawing from the Energy Charter Treaty: The End is (not) Near, Kluwer Arbitration Blog, 4 November 2022, available at: https://arbitrationblog.kluwerarbitration.com/2022/11/04/withdrawing-from-the-energy-charter-treaty-the-end-is-not-near/ (21/12/2023).

74 *International Law Commission*, Draft Articles on the Law of Treaties, Article 37, commentary 2, YILC 1966, vol. II, p. 187.

75 Ibid., Article 37, commentary 3 (reference to Article 20 of the Berlin Convention of 1908 for the Protection of Literary Property, which laid down an express prohibition of *inter se* modifications; inclusion of non-prohibition requirement into chapeau).

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ECT, even though not explicitly precluding modifications by *inter se* agreements, represented a prohibition within the meaning of Article 41 VCLT.[76] Further investment tribunals took a similar stance.[77] Other tribunals found that depriving investors of access to dispute settlement would be contrary to the effective execution of the ECT's object and purpose, likewise referring to Article 16 ECT to sustain this point.[78] For example, the tribunal in *Silver Ridge v. Italy* held:

> [U]nder Article 41 of the VCLT, it is further required that the modification does not affect the enjoyment by other parties of their rights or the performance of their obligations under the ECT and that the modification 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. With respect to the latter requirement (which must be cumulatively fulfilled with the former one), the Tribunal is not convinced by the Respondent's submission […] that the purported treaty modification was about reinforcing the treatment of investors and investment within the EU. In fact, the dispute settlement provision entitling investors to have recourse to international arbitration is often perceived as the most essential element of an investment treaty and is also considered by the present Tribunal as a decisive element in conceiving of the ECT as being more favorable than EU law for purposes of the Article 16 ECT assessment.[79]

Although all of these tribunals addressed the question whether the EU treaties could be considered to constitute an *inter se* agreement between EU member states to exclude dispute settlement under the ECT's Article 26 among themselves, their reasoning is equally relevant with respect to the sunset clause. A removal of the sunset clause among certain states would also remove dispute settlement between them and investors from other EU member states altogether. This cannot be compatible with the effective execution of the ECT's object and purpose.[80] As the tribunal in *BayWa r.e. v. Spain* stressed, "Article 16 of the ECT […] evinces an intent […] to preserve the rights of investors and investments, which constitute a major plank of that multilateral treaty".[81]

76 ICSID, case No. ARB/12/12, *Vattenfall AB et al. v. Germany*, Decision on the *Achmea* Issue of 31 August 2018, para. 221.

77 See e.g. ICSID, case No. ARB/15/45, *Landesbank Baden-Württemberg et al. v. Spain*, Decision on the "Intra-EU" Jurisdictional Objection of 25 February 2019, para. 186.

78 ICSID, case No. ARB/15/16, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, para. 276.

79 ICSID, case No. ARB/15/37, *Silver Ridge Power BV v. Italy*, Award of 26 February 2021, para. 229 (footnote omitted).

80 See also *ECT Secretary General*, Letter to the President of the European Parliament (n 19), p. 3.

81 See e.g. ICSID, *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, para. 276.

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3. Preliminary Conclusions

Overall, while a withdrawal of the EU, France, Germany, Poland and the other states dissatisfied with the ECT in its current form would not necessarily prevent a successful conclusion of the modernization process, it would leave the withdrawing states with the effect of the twenty-year sunset clause under Article 47(3) ECT. The "old ECT", and its investment protections for fossil fuels, would thus remain binding for those states for a much longer period than the modernized ECT envisages. Once a state has completed the withdrawal process, the option of shortening the sunset period for investments in fossil fuels provided for by the AIP will no longer be available. And it appears highly unlikely that arbitral tribunals would allow such a state to escape the sunset clause by way of unilateral termination or by modification per an *inter se* agreement with the other withdrawing states.

While the states which have recently announced plans to withdraw from the ECT are not likely to change course and make use of the AIP's benefits, such a change could still take place at this stage. Except for France, Germany, Poland, and Luxembourg, none of these states have formally notified their intention to withdraw to the depository and therefore remain free to reconsider their choice. For those states that have already submitted their notification of withdrawal or may do so in the future, there is still a way to reverse their decision: Under Article 68 VCLT and customary international law,[82] states may revoke a notification of withdrawal from a treaty "at any time before it takes effect", i.e. in this case before the one-year period provided by Article 47(2) ECT elapses.[83] Of the four states that have already embarked on the formal withdrawal process, this would only concern Luxembourg, which would otherwise cease to be an ECT member state on 17 June 2024.[84]

82 Art. 68 of the VCLT likely reflects customary international law, since the ICJ stated that the rules on the termination of a treaty laid down in the VCLT could "in many respects" be considered a codification of existing custom, see ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1970] ICJ Rep 4, para. 94; for a different opinion see *Tzanakopoulos*, in: *Corten/Klein* (eds.), Art. 68 VCLT, paras. 3–4.

83 Some writers appear to read the term "effect" in Art. 68 of the VCLT as referring to the practical as opposed to the legal effects of a withdrawal, thus concluding that a withdrawal notification may not be revoked after the other state parties have begun to undertake preparations with respect to the notifying state's withdrawal; this view is, however, not in consonance with the article's object to strengthen treaty relations by encouraging revocations of withdrawals, see *Schäfer*, Withdrawing from the 'Withdrawal Doctrine', Völkerrechtsblog, 21 January 2021, available at: https://voelkerrechtsblog.org/de/withdrawing-from-the-withdrawal-doctrine/ (21/12/2023), and does not reflect the intention of the ILC, see *ILC*, Draft Articles on the Law of Treaties, YILC 1966, vol. II, Art. 64, commentary 2.

84 *Energy Charter Secretariat*, Written notification of withdrawal (n 8).

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II. Implementation of the modernized ECT among certain parties only

Turning to the implementation of the modernized ECT among the treaty's remaining members, it is for now uncertain which states will form part of this latter group, if any. The EU and its member states might all withdraw. Yet, at present it is equally possible that a majority of EU member states decides to move ahead with the modernization process irrespective of the EU's – or rather the EU Commission's – position. What is certain, however, is that the relationship among all those parties willing to support the modernization effort by ratifying the AIP would instead be governed by the modernized ECT as soon as it enters into force, rendering the "old ECT" inapplicable insofar.[85]

The following sections will focus on the consequences that an entry into force of the AIP would bring about for those states willing to ratify it. We will be covering the impact of the new substantive protections (1.) and the AIP's provision on the intra-EU objection (2.) on pending and future arbitrations, before turning to some preliminary conclusions (3.). Especially the effect of the AIP's provision seeking to exclude the ECT's application intra-EU will be of relevance to many EU member states. Arguably, the earlier that provision effectively precludes the ECT's application between EU member states and investors from other member states, the sooner these states will have brought their ECT obligations in compliance with the ECJ's decisions in *Achmea* and *Komstroy*.

1. The substantive protections of the modernized ECT in pending and future arbitrations

The changes to the ECT and in particular its substantive treatment standards will, should they enter into force, be of direct relevance to future investments and future investment cases. They should have no bearing, however, on pending ECT cases. Treaties generally do not take retroactive effect under Article 28 of the VCLT[86], which is equally the case for their amendments. Article 28 VCLT embodies the fundamental rule of intertemporal law according to which the "legality of a state's conduct must be assessed in light of the law that was in force at the time of its conduct".[87] This rule, sometimes referred to as the non-retroactivity principle, has a longstanding history in international law. Already in 1928, Judge Huber as sole arbitrator in the *Island of Palmas* case held:

85 This consequence is clearly provided for by Art. 42(4) ECT, see *Hobér*, p. 512, and also envisioned by general international law in the form of Art. 30(3), (4) lit. a VCLT.

86 Art. 28 VCLT is reflective of customary international law, see ICJ, *Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Merits, [2012] ICJ Rep 422, para. 100.

87 *Schreuer*, McGill Journal of Dispute Resolution 2014/1, pp. 1, 20.

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> A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.[88]

This position was also reaffirmed by the ILC in relation to its work on state responsibility. Article 13 of the ILC's 2001 Articles on State Responsibility reflects the rule that the legality of a state's actions under international law must be measured against the obligations it was under at the time of the relevant conduct. In the ILC's commentary on Article 13, rapporteur Crawford specifically stressed that

> once responsibility has accrued as a result of an internationally wrongful act, it is not affected by the subsequent termination of the obligation, whether as a result of the termination of the treaty which has been breached or of a change in international law.[89]

ECT investment arbitrations pending at the time the modernized ECT enters into force – ninety days after surpassing the threshold of ratification by ¾ of the ECT's membership – would necessarily relate to alleged wrongful acts committed by states *before* that date. Consequently, under Article 28 VCLT, the merits of the respective arbitrations would be governed by the substantive standards of protection of the "old ECT". Nothing in the AIP would suggest that the parties intended to give retroactive effect to the "updated" substantive protections contained therein.

The line of reasoning generally followed by investment tribunals reinforces this result. Invoking the need to safeguard vested rights of investors that have commenced proceedings, tribunals have been reluctant to give retroactive effect to amended treaties or authentic interpretations that were in effect disguised amendments. For instance, the tribunal in *Enron v. Argentina* stressed that, while states are free to amend their treaties, this "would not affect rights acquired under the Treaty by investors or other beneficiaries".[90] That means states "cannot move the goalposts with regard to pending disputes or disputes arising out of facts that occurred before the amendment of the treaty".[91]

2. The future of the intra-EU objection under the modernized ECT

The question of the modernized ECT's temporal application becomes more delicate, however, with respect to one of the central issues the modernization process – at least from the EU's perspective – aimed to resolve, namely the removal of intra-EU investment arbitrations from the scope of the investor-state dispute settlement mechanism established by Article 26 ECT.

88 PCA, Case No. 1925-01, *Island of Palmas case (Netherlands, USA)*, 4 April 1928, UNRIAA Volume II, pp. 829, 845.
89 *Crawford*, The ILC's Articles on State Responsibility, p. 133.
90 ICSID, case No. ARB/01/3, *Enron v. Argentina*, Award of 22 May 2007, para. 337.
91 *Gazzini*, Authentic (or Authoritative) Interpretation of Investment Treaties by the Treaty Parties, ejil:talk!, 17 August 2020, available at: https://www.ejiltalk.org/authentic-or-authoritative-interpretation-of-investment-treaties-by-the-treaty-parties/ (21/12/2023).

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As it is well-known, the European Court of Justice (ECJ) first declared intra-EU investment arbitration incompatible with EU law in its 2018 *Achmea* judgment[92], and extended this holding also to the ECT in 2021.[93] Yet, although the ECJ clarified this position from the perspective of EU law, the overwhelming majority of arbitral tribunals has rightly continued to reject the so-called intra-EU objection under general international law.[94] While the majority of EU member states meanwhile has signed a multilateral agreement to terminate all BITs in force between them (hereinafter: the Termination Agreement),[95] and the few member states that did not join this Termination Agreement undertook to terminate their intra-EU BITs otherwise,[96] the ECT had so far remained unaddressed.[97]

The AIP seeks to tackle the issue of intra-EU investment arbitrations in its Article 24(3), which reads:

> For greater certainty, Articles 7, 26, 27, 29 shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation in their mutual relations.[98]

As with the application of the modernized ECT's substantive provisions, it should be rather uncontroversial that also Article 24(3) AIP will apply to future arbitrations under the ECT, i.e. arbitrations initiated and consent to arbitration perfected after the AIP enters into force.[99] In this way, the adoption of the modernized ECT would bring the EU member states closer to and sooner in compliance with the

92 CJEU, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2013:411, para. 60. For a discussion of the judgment, see amongst many *Janssen/Wahnschaffe*, in: Chen/Janssen (eds.), pp. 263, 265–70; *Segoin*, Revue du droit de l'Union européenne 2019/1, p. 225; *Wuschka*, ZEuS 2018/1, pp. 25, 27–33.

93 *Republic of Moldova v. Komstroy* (n 8).

94 The sole exception so far has been the award in the Stockholm-seated case of SCC, Case No. V 2016/135, *Green Power v. Spain*, Award of 16 June 2022, paras. 117 et seq.

95 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 206 of 29 May 2020; for an analysis see *Tropper/Reinisch*, Austrian Yearbook on International Arbitration 2020, p. 301.

96 This includes Austria, Finland, Sweden, and Ireland, ibid., p. 332.

97 See also the preamble of the Termination Agreement, which expressly postponed the question of the ECT's intra-EU application.

98 Art. 24(3) AIP (n 11).

99 The only argument that might be raised against such an application may be based on the sunset clause contained in Art. 47(3) ECT, under which investments made prior to the ECT's denunciation by any state will enjoy the treaty's protection for further 20 years. As Art. 47 ECT governs only unilateral withdrawals from the ECT, however, the context of Art. 47(3) seems to indicate that the sunset period does not apply to modifications of the treaty such as the AIP, see *Reinisch/Mansour Fallah*, ICSID Review-FILJ 2022/1–2, p. 112. Nevertheless, some arbitral tribunals have applied sunset clauses to mutual termination agreements concluded by the member states to an investment protection treaty and found that those treaties continued to protect investments made before the mutual termination; see PCA, Case No. 2012-07, *Bahgat v. Egypt*, Decision on Jurisdiction of 30 November 2017, para. 313; UNCITRAL, *Walter Bau v. Thailand*, Award of 1 July 2009, para. 9.5. It therefore cannot be completely ruled out that future arbitral tribunals will adopt a similar approach regarding Art. 24(3) AIP and the sunset clause contained in Art. 47(3) ECT.

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ECJ's approach than a withdrawal from the ECT could in light of the operation of its sunset clause.

By contrast, a retroactive effect of the "clarification" in the AIP appears doubtful. Investment tribunals generally operate under the assumption that determinations of jurisdiction are to be made in light of the legal situation as it existed when consent to arbitration was established. That is normally the moment at which the investment claim is filed. The rationale for the date of the acceptance of the state's offer to arbitrate as the critical date is that "an arbitration agreement between a claimant and respondent state cannot simply be unilaterally extinguished by the respondent".[100] Specifically, Article 25 (1) 2nd sentence of the ICSID Convention reaffirms this position by stating that, "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally". According to *Schreuer*, this necessitates that the arbitration agreement "remains in existence even if the States parties to the BIT agree to amend or terminate the treaty".[101] And the now agreed "clarification" of the intra-EU inapplicability of the ECT would formally just be such an amendment of the treaty.

As we will show in the following, these assumptions in investment law scholarship and practice have equally firm roots in general international law. The most obvious way in which Article 24(3) AIP could affect pending intra-EU ECT arbitrations would be direct retroactivity, i.e. the application of the article to facts and situations predating the entry into force of the modernized ECT. Unlike the 2020 Termination Agreement, which contains provisions that explicitly seek to govern its effects on pending and concluded arbitrations,[102] however, the AIP does not address this question in any way. Consequently, in the absence of a *lex specialis* in the treaty,[103] the question whether Article 24(3) AIP affects pending and concluded arbitrations is governed by general international law as reflected by Article 28 VCLT.

We will first further illustrate why an application of Article 24(3) AIP to pending arbitrations would constitute a retroactive application of this norm (a)). Then, we will set out why Article 24(3) must not be given any retroactive effect under the law of treaties (b)) and illustrate the role that principles protecting the individual rights of investors play in this regard (c)). Thereafter, we will analyze whether Article 24(3) AIP could be read as a "subsequent agreement" to be considered when interpreting the ECT's dispute settlement clause (d)). Finally, we will take a brief look at the proposed EU subsequent agreement to the ECT, which aims to complement the AIP (e)).

100 *Tropper/Reinisch*, Austrian Yearbook on International Arbitration 2020, p. 329.

101 *Schreuer*, in: Muchlinski/Ortino/Schreuer (eds.), pp. 830, 837

102 See *Tropper/Reinisch*, Austrian Yearbook on International Arbitration 2020, p. 306 et seq.

103 States are, in principle, free to derogate from general international law by establishing a special regime for the regulation of certain questions, see ICJ, *Right of Passage over Indian Territory (Portugal v. India)*, Merits, [1960] ICJ Rep 6, 42.

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a) Would an application of Article 24(3) AIP to pending arbitration proceedings constitute a retroactive application?

As a threshold question, we first need to clarify whether, once the modernized ECT has entered into force, an application of Article 24(3) AIP in pending ECT arbitrations would fall within the ambit of the non-retroactivity principle as enshrined in Article 28 VCLT. It is not in question that the principle applies to actions that have already been completed and lie fully in the past when a new rule of international law comes into effect (*acta praeterita*).[104] These are to be distinguished from actions that have commenced in the past but have not yet concluded and are still ongoing in the present (*acta pendentia*).[105] The non-retroactivity principle only applies to *acta praeterita*, meaning that *acta pendentia* are affected by new treaty provisions as soon as they enter into force.[106]

Consequently, whether pending arbitrations are presumed to be excluded from the scope of Article 24(3) AIP under the non-retroactivity principle depends on their characterization as either *acta praeterita* or *acta pendentia*. This question must be differentiated strictly from the characterization of the alleged wrongful acts by the respondent states forming the substance of such arbitrations. The latter can easily be classified as *acta praeterita*, meaning that they are unaffected by the AIP under the non-retroactivity principle (see above).

Although it would at first seem logical to classify pending (i.e. still ongoing) arbitrations as *acta pendentia*, this would ignore the fact that every arbitration is based on the consent of the parties, which is manifested in an arbitration agreement. While the arbitration proceeding itself is an ongoing process, the conclusion of the arbitration agreement that legitimizes it is a singular act that takes place on a specific date.[107] For treaty-based investment arbitrations, the respondent state's consent is usually given by way of a unilateral permanent offer contained in the respective investment protection treaty,[108] in case of the ECT in Article 26. Investors can then accept this offer, perfecting the arbitration agreement on the date of the accep-

104 *von der Decken*, in: Dörr/Schmalenbach (eds.), Art. 28 VCLT, para. 21.

105 Ibid.

106 Ibid., para. 23–24; this is confirmed by jurisprudence of the European Court of Human Rights (ECtHR), see *Loizidou v. Turkey*, Preliminary Objections, Judgment of 23 March 1995, App.-No. 15318/89, paras. 102–104, as well as arbitral tribunals, see ICSID, case No. ARB(AF)/99/2, *Mondev v. USA*, Award of 11 October 2002, paras. 68–69 and has been accepted by the ILC during the VCLT's drafting process (see ILC (n 74), Article 24, commentary 3).

107 Cf. *Schreuer*, in: Waibel and others (eds.), pp. 361–62, highlighting that a precise determination of the date of consent is necessary for many provisions of the ICSID Convention to operate.

108 *Dolzer/Kriebaum/Schreuer*, pp. 364–367.

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tance.[109] Once an agreement to arbitrate is perfected, it cannot be invalidated unilaterally, what renders a withdrawal of consent by either party impossible.[110]

This nature of an arbitration agreement as a singular act in time which irrevocably creates the foundation for the future arbitration proceeding characterizes it as an *actum praeteritum* rather than an *actum pendens*. There is nothing "pending" about an agreement that has been concluded once and for all. As Article 24(3) AIP aims at rendering the consent to arbitrate given in Article 26 ECT inapplicable in the relations between EU member states, it relates to the arbitration agreement rather than the subsequent proceeding. Consequently, the act in time relevant for the application of the non-retroactivity principle is the arbitration agreement; whether the proceeding based on it is still ongoing is irrelevant.[111]

From this follows that an application of Article 24(3) AIP to the detriment of pending arbitration proceedings would constitute a retroactive application of this provision. Under the non-retroactivity principle as contained in Article 28 VCLT, Article 24(3) AIP must be presumed not to apply in such a manner.

b) Does an interpretation of the new Article 24(3) mandate retroactive application?

Article 28 VCLT does not, however, prohibit states from giving treaty provisions retroactive effect. It merely establishes a presumption against retroactivity, which can be overcome.[112] The determination whether Article 24(3) AIP defies the presumption against retroactivity and eliminates the arbitration agreements on which pending arbitration proceedings are based requires an interpretation of the provision in accordance with the rules enshrined in Articles 31 et seq. VCLT.[113] Under these rules, Article 24(3) AIP must primarily be analyzed in the light of its wording, context as well as object and purpose.[114]

Article 24(3) AIP's introductory clause – "For greater certainty" – seems to indicate that the parties have always understood the ECT's dispute settlement procedure as inapplicable to intra-EU disputes and merely wished to clarify this. It could

109 *Schreuer*, in: Muchlinski/Ortino/Schreuer (eds.), p. 361; *Dolzer/Kriebaum/Schreuer*, pp. 364–367.

110 For ICSID arbitrations, this is explicitly stipulated in Art. 25(1)(2) of the ICSID Convention, cf. *Schill and others*, Schreuer's Commentary on the ICSID Convention, pp. 420 et seq.

111 Cf. *Reinisch/Mansour Fallah*, ICSID Review-FILJ 2022/1–2, pp. 110–11 and *Lauvaux*, Arbitration International 2022/3, p. 211, both discussing the question whether the termination of an investment protection treaty would affect pending arbitrations and relying on the concept of the perfected agreement to answer this question in the negative.

112 See the wording of Art. 28 VCLT: "Unless a different intention appears from the treaty or is otherwise established […]".

113 Cf. *von der Decken*, in: Dörr/Schmalenbach (eds.), Art. 28 VCLT, paras. 10–11; the rules of interpretation contained in Articles 31 and 32 VCLT also reflect customary international law, see ICJ, *Application of the ICERD (Qatar v. United Arab Emirates)*, Preliminary Objections, [2021] ICJ Rep 71, para. 75.

114 Art. 31(1) VCLT.

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therefore be read as mandating a retroactive application of Article 24(3) AIP. This result is, however, by no means compelling.

A look at state practice reveals that the phrase "for greater certainty" is also used where a clause is not intended to produce retroactive effects. For instance, in 2017, India and Bangladesh adopted Joint Interpretative Notes regarding their BIT[115], which sought to clarify the scope of the FET standard contained therein. The relevant part of the joint notes also begins with the phrase "for greater certainty", even though the notes themselves explicitly provide that they shall only be applied by tribunals constituted *after* their issuance.[116] This example illustrates that the general understanding of the phrase "for greater certainty" in international law does not necessarily support a retroactive application of Article 24(3) AIP.

Thus, as the wording of Article 24(3) AIP is inconclusive, resort to the other means of interpretation provided for in Article 31 VCLT is necessary.[117] Jurisprudence on the retroactivity of treaty provisions, although rather scarce, can assist in this task.

The ICJ, in its first judgment in the *Ambatielos* case, mainly relied on the context of the relevant clause to find that it did not apply retroactively: The treaty before the Court in that case contained a ratification clause stipulating that it would enter into force after ratification by both parties. As this provision regulated the point in time the treaty would begin to produce effects without indicating retroactivity of any provisions, the Court reasoned, the clause in question could not be interpreted as applying to past events.[118] The AIP too contains a ratification clause, which stipulates that the treaty shall enter into force ninety days after the deposit of the thirtieth instrument of ratification (see above) and does not provide for earlier entries into force of any particular provisions.[119] The context of Article 24(3) AIP, analyzed in the light of relevant ICJ jurisprudence, thus seems to militate against a retroactive application of the clause to arbitration agreements already concluded.

Relying on the relevant treaty's object and purpose, the Permanent Court of International Justice (PCIJ) found in the *Mavrommatis* case that certain provisions of

115 Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments ("Bangladesh-India BIT") (signed 2 September 2009, entered into force 7 July 2011), available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/371/bangladesh---india-bit-2009 (21/12/2023).

116 *Department of Economic Affairs of the Republic of India*, Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments (signed 4 October 2017), Art. 9(3)(1), available at: https://dea.gov.in/sites/default/files/Signed%20Copy%20of%20JIN.pdf (21/12/2023); see also *Gazzini* (n 91).

117 Only a wording so clear and unambiguous as to leave no questions open would render resort to the other means of interpretation superfluous, see ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, [1950] ICJ Rep 4, 8.

118 ICJ, *Ambatielos Case (Greece v. United Kingdom)*, Preliminary Objection, [1952] ICJ Rep 28, 19–20.

119 Art. 44(1) AIP.

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the Treaty of Lausanne applied retroactively. The Court held that, because the treaty had *inter alia* been concluded to remedy actions already taken by the United Kingdom against certain foreign concessionaires, it could not fulfill its function if it applied only to future events. Retroactive application, in the Court's opinion, was therefore necessitated to ensure the operation of the Lausanne Treaty in accordance with its purpose.[120] While it could be argued that a retroactive application of Article 24(3) AIP would be conducive to its purpose of ending intra-EU investment arbitrations, it cannot be said that this purpose necessitates retroactivity. Even without retroactive application, Article 24(3) AIP would still effectively prevent any such intra-EU arbitrations for the future (see above), while the Treaty of Lausanne would have been deprived of almost its entire effect if applied only to future events.

The only historical case supportive of giving retroactive effect to Article 24(3) AIP appears to be the *Chamizal* case, which was decided by the US-Mexican Border Commission in 1911. The commission found that an interpretative agreement concluded in 1884 between the USA and Mexico, which sought to clarify some ambiguities in an older border convention between the same parties, was applicable to border disputes arising prior to its entry into force.[121] The border commission explicitly relied on the interpretative character of the 1884 agreement to justify this reasoning, stating that an agreement intended to remedy ambiguities in an earlier treaty should be applied retroactively.[122] The guidance provided by this case alone, however, seems insufficient to establish retroactive applicability of Article 24(3) AIP against all the considerations discussed above. This is reinforced by the fact that the *Chamizal* commission did not consider any rights or legally protected interests of individuals affected by its interpretation of the 1884 agreement, which we will turn to now.

c) Principles protecting individual rights of investors

Above all, the prospect of applying a treaty provision retroactively to the detriment of investors – whose pending arbitration actions would be terminated in a *deus ex machina* kind of way if Article 24(3) AIP were to apply retroactively – creates a feeling of unease. National legal orders around the world tend to impose strict limitations on retroactive lawmaking if the rights of individuals are adversely affected by it. Such limits are mostly based on fundamental rule of law considerations enshrined in the respective constitutions.[123] As already indicated above, there are several rules of international law which might equally operate to this effect. Among the

120 PCIJ, *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, PCIJ Rep Series A No 2, 7, p. 34; see also *ILC* (n 74), Article 24, commentary 1.
121 *Chamizal Case (Mexico, United States)*, Award of 15 June 1911, UNRIAA Volume XI, pp. 316, 325.
122 Ibid.
123 See, for example, for India: *Jawaharmal v. State Of Rajasthan And Others* [1966 AIR 764, 1966 SCR (1) 890], where the Indian Supreme Court held that legislation with retroactive effect is not permissible under the Indian Constitution if its effects for the ad-

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rules discussed by scholarly literature and arbitral jurisprudence are the customary protection of the vested rights of foreigners, the protection of legitimate expectations as well as international human rights law.[124] These principles, if they were to prohibit states from interfering in pending arbitrations to the detriment of investors, would have to be considered when interpreting Article 24(3) AIP under the principle of systemic integration as enshrined in Article 31(3) lit. c VCLT.[125]

The concept of vested rights forms part of the customary international law protecting aliens from detrimental actions of their host states.[126] While it is not entirely clear when a right qualifies as "vested" under this standard, mere favorable business conditions or goodwill are not protected.[127] The protection of legitimate expectations derives from the FET standard contained in many investment treaties, i.a. in Article 10(1) ECT.[128] Likewise, under the *European Convention on Human*

dressed individuals are "excessive"; for the United States see *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994), pointing to various provisions in the U.S. Constitution that limit the possibility of retroactive legislation, i.a. the 5th Amendment's Takings and Due Process Clauses; for Germany see BVerfG, Order of the First Senate of 17 December 2013 – 1 BvL 5/08 –, para. 63, where the Federal Constitutional Court inferred a prohibition of burdensome retroactive laws from the principles of legal certainty and legitimate expectations as reflected in Article 20(3) of the German Basic Law.

124 See *Tropper/Reinisch*, Austrian Yearbook on International Arbitration 2020, pp. 321 et seq.; *Reinisch/Mansour Fallah*, ICSID Review-FILJ 2022/1–2, pp. 117–118; *Lauvaux*, Arbitration International 2022/3, p. 206. Further principles often discussed in this context are the concepts of *res inter alios acta aliis non nocet* embodied in Art. 37(2) VCLT as well as estoppel and abuse of rights. These will, however, not be further discussed in this paper. Article 37(2) VCLT only applies in the relations between states and is therefore irrelevant for the rights of investors, see *Tropper/Reinisch*, Austrian Yearbook on International Arbitration 2020, pp. 322–323; estoppel and abuse of rights, while suitable to protect the interests of investors against retroactive amendments, would operate in a manner different from the concepts discussed above, and could not influence the interpretation of Art. 24(3) AIP via Art. 31(3)(c) VCLT. They are therefore beyond the scope of this paper.

125 As applied by the ICJ for example in *Oil Platforms (Iran v. USA)*, Merits, [2003] ICJ Rep 161, para. 41 and *Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, [2008] ICJ Rep 177, paras. 112–113. The application of this principle is permitted by Article 24(3) AIP's openness to interpretation that has been elaborated on in section C.II.2.b). If the clause were to set forth its retroactivity in clear and unambiguous terms, the principle of systemic integration could not apply, since states are free to conclude treaties that entail breaches of their other obligations under international law, see ICJ, *Obligation to Prosecute or Extradite* (n 86), para. 111.

126 See PCIJ, *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Merits, PCIJ Rep Series A, No. 7, 5, p. 21; PCIJ, *Factory at Chorzów (Germany v. Poland)*, Merits, PCIJ Rep Series A, No. 17, 5, p. 46.

127 PCIJ, *Oscar Chinn Case (United Kingdom v. Belgium)* PCIJ Rep Series A/B No. 63, 65, p. 27.

128 *Hobér*, p. 193 ("The general philosophy underlying the concept of legitimate expectations is that the investor has a right to expect that the framework existing at the time of the investment will remain stable and predictable"); ICSID, case No. ARB/03/24, *Plama v. Bulgaria*, Award of 27 August 2008, paras. 175–176.

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Rights[129], Article 1 of the *Protocol No. 1*[130] protects legitimate expectations as part of the human right to property guaranteed therein.[131]

All three concepts referred to might prohibit the termination of a pending arbitration against the will of the claimant investor. This depends on whether a pending arbitration constitutes a sufficiently solidified right of the investor, or a mere hope or opportunity that falls outside of the ambit of protected rights. Some arbitral tribunals have already recognized that investors have a legitimate expectation protected by Article 10(1) ECT that pending arbitrations are not terminated against their will by subsequent actions of the ECT member states.[132] The European Court of Human Rights, on its part, has recognized that at least final arbitral awards are protected by Article 1 of Protocol No. 1,[133] which indicates that such protection could be extended to pending arbitrations.

Given that, once an investor accepts the host state's unilateral permanent offer to arbitrate enshrined in Article 26 ECT, there is a perfected agreement entitling them to an award, it appears plausible that pending arbitrations are solidified enough to qualify for protection under the principles of vested rights and legitimate expectations as well as the human right to property. Support for this position can also be found in the jurisprudence of the ICJ, which has recognized that, once a case is referred to an international tribunal and both parties have taken procedural steps in the case, their respective interest in the continuation and successful conclusion of the proceeding is worthy of protection.[134] Therefore, Article 24(3) AIP must, in accordance with Article 31(3) lit. c VCLT, be interpreted as not applying retroactively to pending arbitrations, as this would infringe on the legal principles just mentioned.

d) Bypassing non-retroactivity: Article 24(3) AIP as a "subsequent agreement" under Article 31(3) lit. a VCLT?

The conclusion just reached could be subverted, however, by the argument that Article 24(3) AIP should not be *applied* to pending arbitrations, but that the "old ECT" be *interpreted* in its light instead in pending arbitrations, i.e. by viewing it as a subsequent agreement regarding the ECT's interpretation in the sense of Article 31(3) lit. a VCLT. Such an argument would, however, face multiple obstacles and therefore be unlikely to succeed:

129 Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4 November 1950, entered into force 3 September 1953) 213 UNTC 221, ETS No. 005.

130 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (signed 20 March 1952, entered into force 18 May 1954) ETS No. 009.

131 *Grabenwarter*, Article 1 Protocol No. 1 ECHR, para. 3.

132 ICSID, case No. ARB/15/50, *Eskosol v. Italy*, Decision on Termination Request and Intra-EU Objection of 7 May 2019, para. 226.

133 ECtHR, *Regent Company v. Ukraine*, Judgment of 3 April 2008, App.-No. 773/03, para. 61; ECtHR, *BTS Holding A.S. v. Slovakia*, Judgment of 30 June 2022, App.-No. 55617/17, para. 49.

134 ICJ, *Barcelona Traction (Belgium v. Spain)*, First Phase, [1964] ICJ Rep 6, 18.

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First, a subsequent agreement can only be considered for the interpretation of a treaty under Article 31(3) lit. a VCLT if it has been entered into by all parties to the treaty in question.[135] Thus, if not every single ECT contracting party ratifies the AIP, Article 24(3) cannot be used to interpret the "old ECT" in pending proceedings. Given the currently debated exodus of EU member states and the EU from the ECT, this will be a major obstacle.

Secondly, whether subsequent agreements in the sense of Article 31(3) lit. a VCLT are binding on tribunals tasked with the interpretation of a treaty is subject to debate. Some scholarly voices, on the one hand, insist that such agreements constitute authentic (or authoritative) interpretations of the respective treaty and that tribunals therefore must abide by them.[136] Several arbitral tribunals, on the other hand, have pointed to the fact that Article 31(3) VCLT merely requires that such agreements be "taken into account" when interpreting a treaty, inferring from this language that they are not binding.[137] The ILC took a similar position in its work on "Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties":

> According to the chapeau of article 31, paragraph 3, subsequent agreements and subsequent practice shall, after all, only 'be taken into account' in the interpretation of a treaty, which consists of a 'single combined operation' with no hierarchy among the means of interpretation that are referred to in article 31 (see draft conclusion 2, paragraph 5). For this reason, and notwithstanding the suggestions of some commentators, *subsequent agreements and subsequent practice that establish the agreement of the parties regarding the interpretation of a treaty are not necessarily legally binding*.[138]

Following this approach, the "clarification" in Article 24(3) AIP would not have any higher value than other elements relevant in the interpretation of the ECT.[139] In

135 ICJ, *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Judgment, [2014] ICJ Rep 226, para. 83.

136 For example, *Dörr*, in: Dörr/Schmalenbach (eds.), Art. 31, para. 74. In the preamble to the EU Subsequent Agreement, discussed below (section II.b.ii.5), the EU Commission also relies on the position of the PCIJ in *Jaworzina (Polish-Tchekoslovakian Border),* Advisory Opinion, PCIJ Rep Series B No. 8, 7, p. 37. See *EU Commission*, EU Subsequent Agreement, Annex to 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.

137 ICSID, case No. ARB/17/27, *Magyar Farming v. Hungary*, Award of 13 November 2019, para. 218; PCA, Case No. 2017-15, *A.M.F. v Czech Republic*, Final Award of 11 May 2020, para. 337.

138 *International Law Commission*, Draft Conclusions on Subsequent Agreement and Subsequent Practice in Relation to the Interpretation of Treaties, Conclusion 3, commentary, YILC 2018, vol. II, Part Two, p. 187 (footnotes omitted, emphasis added).

139 See further *Berner*, HJIL 2016, p. 866: "In other words, Art. 31 VCLT does not establish a hierarchical relationship between the various primary means of interpretation; it requires, as Waldock [the ILC's special rapporteur during the drafting of the VCLT] vividly described it, that all primary means of interpretation are "thrown into the crucible".".

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the ILC's words, authentic interpretations are not "conclusive."[140] Instead, the "clarification" would form part of all the elements under Article 31 VCLT – "together with the context"[141] – that a tribunal has to take into account in its exercise of interpretation.[142] Even though a tribunal could hardly disregard the authentic interpretation by the ECT member states without valid reasons, such reasons exist in relation to Article 24(3) AIP.

Specifically, the new interpretation can hardly be reconciled with the ECT's text as it presently stands as well as a systematic reading of Article 26 in the light of its context within the treaty and the ECT's object and purpose. That is to say that all other elements of the interpretative exercise speak against the meaning which the "clarification" will seek to ascribe to Article 26 ECT. Against the long line of jurisprudence on the ECT's intra-EU applicability, the new "clarification" would rather appear as a means for the ECT membership to put an end to a politically unwelcome, yet perfectly reasonable, interpretation. It would retroactively declare several dozens of intra-EU ECT arbitral awards baseless. This in itself should form a valid reason for a tribunal to disregard the clarification, since any other approach would ignore the disputing parties' legal relationship under the ECT, including their trust placed in the arbitration agreement concluded before any amendments to the ECT (and before the clarification was foreseeable). The "clarification" would constitute an attempt to use the treaty amendment process to "move the goal post" for pending arbitral proceedings.

In essence, the ECT contracting parties' "clarification" can therefore only be portrayed as a political declaration in form of a treaty amendment that conflicts with the *lege artis* interpretation of Article 26 ECT undertaken by more than 50 ECT tribunals by now. It consequently cannot be accepted as a valid interpretation for pending disputes under the ECT as it presently stands. Disregarding the "clarification" would therefore be the appropriate approach. It would also pay due regard to principles protecting the individual rights and interests of investors described above, preventing a retrospective interpretation of the clause.[143]

As a result, the compelling reasons against a retroactive application of Article 24(3) AIP to pending arbitrations cannot simply be bypassed by labelling Article 24(3) AIP a "subsequent agreement". An interpretation of the ECT in light of the AIP should be out of the question, just as the AIP's direct retroactive application.

140 *International Law Commission*, Report of the International Law Commission on the Work of its 65th Session (8 July – 9 August 2013), UN Doc. A/68/10.

141 Art. 31(3) VCLT.

142 Art. 31(1) VCLT reads: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.".

143 See *Eskosol v. Italy* (n 136), para. 226, explicitly holding that the protection of legitimate interests under Article 10 ECT might preclude the retroactive application of subsequent agreements.

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e) A final straw: The EU Commission's subsequent agreement proposal

Even though it does not technically form part of the ECT modernization process, the "Subsequent Agreement on the Interpretation of the Energy Charter Treaty" (hereinafter: EU subsequent agreement) should be briefly addressed in this context. Proposed by the EU Commission in October 2022, the EU subsequent agreement is presently a draft treaty that seeks to interpret the entirety of the ECT as inapplicable between EU member states.[144] Explicitly referring to Article 31(3) lit. a VCLT in its preamble, the EU subsequent agreement stipulates that "the ECT does not apply, and has never applied to intra-EU relations".[145]

The fact that the Commission even found it necessary to prepare such an agreement indicates that it shares the concerns against the AIPS's retroactive applicability. The EU subsequent agreement seems to be intended as an insurance policy for the case that arbitral tribunals, for the reasons discussed above, find that Article 24(3) AIP cannot be interpreted as retroactively applying to pending arbitrations.

A detailed legal analysis of the EU subsequent agreement would exceed the scope of this article. In the light of the considerations outlined above, however, a few brief remarks on the agreement can be made: Unlike the AIP, the wording of the EU subsequent agreement explicitly requires its application to pending arbitrations, thereby defying the presumption against retroactivity established by Article 28 VCLT. Since a treaty cannot be interpreted against its express wording,[146] it also does not seem possible to harmonize the agreement with the principles protecting legitimate expectations and vested rights by means of systematic integration. As, however, a subsequent agreement in the sense of Article 31(3) lit. a VCLT can only be taken into account for interpretation if joined by all member states of the original treaty, an agreement concluded only among EU member states could not be considered under Article 31(3) lit. a VCLT. Equally, for the reasons set out above in relation to Article 24(3), it appears highly doubtful that arbitral tribunals would accord a binding effect to the EU subsequent agreement in their interpretation of Article 26 ECT. Therefore, the proposed EU subsequent agreement, should it be further pursued in light of the Commission's present policy changes, appears equally incapable of affecting pending arbitrations as the AIP.

144 See *Deepak*, European Commission proposes subsequent agreement on interpretation of the Energy Charter Treaty, reiterating that intra-EU arbitration is incompatible with the EU treaties (IA Reporter, 6 October 2022), available at: https://www.iareporter.com/articles/european-commission-proposes-subsequent-agreement-on-interpretation-of-the-energy-charter-treaty-reiterating-that-intra-eu-arbitration-is-incompatible-with-the-eu-treaties/ (21/12/2023).

145 Art. 2(1) of the EU Subsequent Agreement (n 126).

146 Cf. ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations* (n 117), 4, 8: ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania,* Second Phase, Advisory Opinion, [1950] ICJ Rep 221, 28–9.

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3. Preliminary Conclusions

Based on the arguments discussed above, we conclude that neither the substantive protections of the ECT as amended by the AIP nor the AIP's provision on intra-EU arbitrations will produce any effect for pending arbitration proceedings or those to be commenced before a potential entry into force of the modernized treaty. Thus, while the modernized ECT, if ratified by enough states to enter into force, would certainly shape investment arbitration in the energy sector in a significant way in the future, present proceedings would remain largely untouched by this development. Still, even though EU member states would not be able to remove the ECT's intra-EU application for already initiated cases, only very few arguments can be made that the initiation of new intra-EU ECT arbitrations would not be precluded after the AIP's entry into force. A ratification of the AIP would therefore have the potential to bring EU member states sooner in compliance with EU law and the ECJ's jurisprudence on intra-EU investment arbitration than a withdrawal, which (as discussed above) triggers the continued application – also intra-EU – of the "old ECT" under its sunset clause.

D. Conclusions

Overall, as this article has shown, the ECT is presently at a tipping point. The EU Commission's initiative to have the EU and its member states leave the treaty instead of further promoting its modernization may well reduce the treaty's membership by half in the long run. This does not mean, however, that the modernization process will necessarily be blocked. Yet, should a major group of member states leave without ratifying the modernized treaty first, this will lead to a situation in which the remaining members will be bound by the new version, once ratified, whereas the current ECT will continue to bind the withdrawing members with respect to investments made before the withdrawal – irrespective of their kind – under the sunset clause.

Withdrawing from the ECT with that consequence, while new and future investments so badly needed for the energy transition will be stripped of such protection, appears to be a particularly ironic side-effect of the EU Commission's change in policy. It remains to be seen whether the EU and its member states will follow through with this plan. It is apparent, however, that the legal issues which will need to be addressed in disputes before arbitral tribunals and state courts one way or the other will only become more complex.

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