

## Where is the Energy: Object and Purpose of the ECT under the Sunset Clause Scrutiny

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### Abstract

This article aims to find the equilibrium between the compatibility of the object and purpose of the Energy Charter Treaty (“ECT”) and the plan of reduction of the 20-year protection of the sunset clause which becomes the hindrance for States fully committing to their environmental obligations in the face of climate change. In so doing, a qualitative, normative, and doctrinal approach will be employed to elaborate on, dissect, and analyze the issues. In producing the analysis of the issue, this article assembles primary sources (original legal texts) and secondary sources (cases, books, commentaries, preparatory work, newspaper articles, online sources) to meaningfully determine the object and purpose of the ECT and its interpretation and implementation. The finding shows that the object and purpose is to enhance energy co-operation through protection of investment and safeguard towards the environment. Thus, the sunset clause reduction plan is compatible with the ECT’s object and purpose.

**Keywords:** Sunset Clause; Energy Charter Treaty; Environment; Investments; Climate Change

### Introduction

In December 2023, three withdrawals from the Energy Charter Treaty (“ECT”) took effect.<sup>1</sup> Poland, Germany, and France collectively withdrew from the ECT under more or less the same reason, either (1) incompatibility with the European Union (“EU”) law; or (2) unsuitability with their environmental commitment.

Under the first reason, as the ECT features investor-State dispute settlement (“ISDS”), a Member State of the EU may be brought before an arbitration by an investor or company incorporated under EU law. In the *Achmea* before the Court of Justice of the European Union (“CJEU”),<sup>2</sup> CJEU reminded the autonomy and supremacy of EU law.<sup>3</sup> By allowing intra-EU disputes outside of the EU courts, such as through arbitration, it will jeopardize the uniformity of interpretation of EU law.<sup>4</sup> Therefore, in order to stop the legal fragmentation, CJEU in *Achmea*

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<sup>1</sup> “Written Notifications of Withdrawal from the Energy Charter Treaty,” 29 December 2023, <https://www.energycharter.org/media/news/article/written-notifications-of-withdrawal-from-the-energy-charter-treaty/>.

<sup>2</sup> *Case C-284/16, Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158 (6 March 2018), para. 33.

<sup>3</sup> Sanja V. Dajic, “The Achmea Cases-Story on Treaty Interpretation, Forum Competition and International Law Fragmentation,” *Zbornik Radova* 52 (2018): 496.

<sup>4</sup> Irina Suatean, “CJEU: Intra-EU Arbitration under the ECT Is Incompatible with EU Law. Brief on CJEU’s Judgment in the Case of Republic of Moldova v Komstroy,” *Romanian Arbitration Journal* 15 (2021): 136.

and in *Komstroy* adjudged that intra-EU arbitration, featured in the investor-State dispute settlement, is incompatible with EU law.<sup>5</sup>

Under the second reason, the ECT has its own notorious precedent of hampering States to comply with their Paris Agreement commitment and any other international environmental treaties obligations (“green commitment”). Through the ISDS feature in the ECT,<sup>6</sup> Contracting Parties have been continuously brought before proceedings by investors who feel aggrieved by the national measures of the Contracting Parties. To date, there are 158 cases brought before the International Center for Settlement of Investment Disputes (“ICSID”) and arbitrations based on the ECT,<sup>7</sup> with Spain dominating it through 51 cases brought against it.<sup>8</sup> The accumulation of the losses that Spain suffered alone after back-to-back proceedings surpasses €7 billion.<sup>9</sup> With that, it becomes apparent that facilitation through ISDS constitutes as the biggest impediment for the Contracting Parties to combat climate change, such as, through the enactment and enforcement of environmentally-motivated national measures.<sup>10</sup> As analyzed by the Intergovernmental Panel on Climate Change (“IPCC”), ECT’s ISDS is designed to protect the interests of investors in energy projects from national policies that could lead to the stranded assets.<sup>11</sup> Therefore, instead of losing billions of dollars due to the failed attempt of striking a proper balance between ECT’s obligations and the green commitments, the measure that the Contracting Parties have *en masse* done is withdrawing from the ECT.

Being awakened by such situations, the Contracting Parties of the ECT gathered to discuss the modernization of the ECT in 2017. Twenty-five topics were proposed in the proposal of modernization (“Modernization Proposal”), where it included the dispute settlement provisions, economic activity in the energy sector, and sustainable development and corporate social responsibility.<sup>12</sup> It was also mentioned regarding the time limits on protection for fossil fuel investments. This, in particular, concerns about the ‘elephant in the room’ that disables the withdrawing Parties to fully commit with their green commitment; the sunset clause. Article 47 paragraph (3) of the ECT stipulates that Contracting Parties that withdraw from the ECT must continue to apply the ECT to the investment in their territory until the next 20 years after the withdrawal takes effect. Hypothetically, Poland therefore must extend the ECT’s application to the existing investment until 2043.

While the Modernization Proposal ambitiously mentioned keywords in favor of the green commitment, it was not manifested well in the Agreement in Principle. In 2022, instead of toning down the 20 years applicability of the ECT with the amendment of Article 47(3), it was the ambition that was toned down into a mere acknowledgment which bears no obligations or

<sup>5</sup> Jed Odermatt, “Is EU Law International? Case C-741/19 Republic of Moldova v Komstroy LLC and the Autonomy of the EU Legal Order,” *European Papers-A Journal on Law and Integration* 2021, no. 3 (2021): 1256, 1261.

<sup>6</sup> Energy Charter Secretariat, “The International Energy Charter Treaty” (2016), Art. 26, <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>.

<sup>7</sup> “Statistics,” accessed June 16, 2023, <https://www.energychartertreaty.org/cases/statistics/>.

<sup>8</sup> “List of Cases - Energy Charter Treaty,” accessed June 4, 2023, <https://www.energychartertreaty.org/cases/list-of-cases/>.

<sup>9</sup> Lucía Bárcena and Fabian Flues, “From Solar Dream to Legal Nightmare” (Transnational Institute (TNI) and PowerShift, 2022), 7–8.

<sup>10</sup> Lea Di Salvatore, *Investor-State Disputes in the Fossil Fuel Industry* (International Institute for Sustainable Development, 2021), 21.

<sup>11</sup> Intergovernmental Panel on Climate Change, “Climate Change 2022: Mitigation of Climate Change,” 2022, 1505–6, [https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC\\_AR6\\_WGIII\\_FullReport.pdf](https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf).

<sup>12</sup> Energy Charter Secretariat, “Policy Options for Modernisation of the ECT,” in *Adoption by Correspondence*, 2019, 2–4, 8–9, 38–40.

any legal consequence. Article 19(2) of the Agreement in Principle prescribes that, “Each Contracting Party reaffirms its respective rights and obligations under the multilateral environmental [...] to which it is a party, such as the UNFCCC, the Paris Agreement.”<sup>13</sup> With this disappointing result, this definitely prompts for renewed modernization of ECT where it amends the sunset clause.

While the amendment of sunset clause has been seen as politically difficult,<sup>14</sup> it must not be seen as the building block that departs the Contracting Parties from their green commitment, especially in light of climate change. A valid question then arises: how can States escape from the sunset clause? While the other scholarly work has argued fundamental change of circumstance,<sup>15</sup> the doctrine has such a high threshold. Another question then arises: despite its political difficulty, is it legally difficult to do so? Does the sunset clause manifest the object and purpose of the ECT? Thus, in light of this inquiry, this article seeks to explore the alignment between the object and purpose of the ECT and the inclusion of the sunset clause. Specifically, this article will unravel the feasibility of removing the sunset clause while ensuring compatibility with the object and purpose of the ECT.

## A. Sunset Clause

Sunset clauses are not a novel innovation in the law of treaties. The use and the utility of it has frequently been employed in major treaties, such as in the Article 280 of the Versailles Peace Treaty, Article 25 of the United Nations Framework Convention on Climate Change, and Article 72 of the ICSID Convention. There are many terms synonymous to it, namely, survival clause,<sup>16</sup> transitional clause,<sup>17</sup> duration clause,<sup>18</sup> and grandfather clause.<sup>19</sup> While the term “sunset clause” was introduced in the 2017, many treaties have used this method to elongate the responsibility of the Member States or Contracting Parties, aimed to ensure the extension and seamless transition to full termination. Thus, it is not the ECT that introduced the sunset clause, as it has been the practice since a long time ago. However, as the 1969 Vienna Convention on the Law of Treaties (“VCLT”) prescribes *pacta sunt servanda*, meaning that a treaty is binding only on the parties to it,<sup>20</sup> how is the sunset clause viewed from the perspective of treaty law? In particular, a sunset clause only effectively applies after the withdrawal takes effect. This chapter will cover two issues: (1) the legality of sunset clauses from the perspective of the law of treaties, and (2) the ECT Sunset Clause.

### 1) Legality of Sunset Clause from the Perspective of the Law of Treaties

The framework of law of treaties in international law is found in the VCLT. Pertaining to the legal aspect of the sunset clause, withdrawal is specifically dealt with under Part V Section 3 of

<sup>13</sup> "Reformed ECT Text," accessed June 16, 2023, [https://www.bilaterals.org/IMG/pdf/reformed\\_ect\\_text.pdf](https://www.bilaterals.org/IMG/pdf/reformed_ect_text.pdf).

<sup>14</sup> Tibisay Morgandi and Lorand Bartels, “Exiting the Energy Charter Treaty under the Law of Treaties,” *King’s Law Journal*, 2023, 24, <https://doi.org/10.1080/09615768.2023.2196834>.

<sup>15</sup> See Morgandi and Bartels, “Exiting the Energy Charter Treaty under the Law of Treaties.”

<sup>16</sup> Eirini Kikarea, “Brexit and Preferential Trade Agreements: Issues of Termination and Survival Clauses,” *Legal Issues of Economic Integration* 46, no. 1 (2019): 53.

<sup>17</sup> Hildah Kerubo Omboga, “Era of Decarbonization, Energy Efficiency on Existing Ships (EEXI) and Carbon Intensity Indicators (CII) Implication on Charter Parties,” 2022, 68.

<sup>18</sup> See Montreux Convention Regarding the Abolition of the Capitulations in Egypt (1937).

<sup>19</sup> Chunbao Liu, “11 China’s Evolving International Investment Treaty Policy towards Liberalism,” *Multilateralism and Regionalism in Global Economic Governance: Trade, Investment and Finance* 92 (2012): 86.

<sup>20</sup> Vienna Convention of the Law of Treaties (1969), Art. 26.

the VCLT. Article 54 stipulates that the termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States. While this seems like solving the issue of legality, Article 70 provides another point of consideration. According to Article 70, unless it is provided or agreed, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. It can be analyzed that if there is withdrawal, it ultimately stops producing any further obligations to perform the treaty, unless the parties agreed to do so. Therefore, the sunset clause is legal as the Contracting Parties agreed to take such obligations. Moreover, as the ECT disallows reservation,<sup>21</sup> sunset clause is an absolutely inescapable package that the Contracting Parties must accept.

## 2) ECT Sunset Clause

A hard-to-swallow pill that a withdrawing Contracting Party must swallow is that it remains under the obligation to protect existing investments after the effective date of withdrawal until twenty years after. Article 47(3) clearly prescribes that,

“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.”<sup>22</sup>

In addition to that, this article is synonymous with the preceding article under Article 45(3)(b) which sets out that,

“In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III and V with respect to any Investments made in its Area during such provisional application by Investors of other signatories shall nevertheless remain in effect with respect to those Investments for twenty years following the effective date of termination, except as otherwise provided in subparagraph (c).”<sup>23</sup>

These two articles can be interpreted that, the failure to protect the pre-existing investments<sup>24</sup> until the next 20 years will lead to the commencement of proceedings before the dispute settlement mechanism. From the investor’s perspective, the inclusion of the sunset clause reinforces the protection of their investments. This clause is widely recognized as a prevalent feature in investment treaties,<sup>25</sup> as evidenced by a working paper prepared by the Organization for Economic Cooperation and Development (“OECD”). Among 2,061 investment treaties curated, nearly 2,000 of them incorporate a sunset clause.<sup>26</sup>

<sup>21</sup> Energy Charter Treaty, Art. 46.

<sup>22</sup> Energy Charter Treaty, Art. 47(3).

<sup>23</sup> Energy Charter Treaty, Art. 45(3)(b).

<sup>24</sup> The investment that falls under the ambit of the term “Investments” under the ECT.

<sup>25</sup> Antonios Emmanouil Kouroutakis, “Sunset Clauses in International Law and Their Consequences for EU Law” (Policy Department for Citizens’ Rights and Constitutional Affairs, European Parliament, 2022), 22, [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703592/IPOL\\_STU\(2022\)703592\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703592/IPOL_STU(2022)703592_EN.pdf).

<sup>26</sup> Kathryn Gordon and Joachim Pohl, “Investment Treaties over Time-Treaty Practice and Interpretation in a Changing World,” 2015, 19.

The presence of a sunset clause in investment treaties secures investors with a sense of confidence and stability, as it establishes a clear timeline outlining the duration and the scope of the protection they can expect. Foreign investments often entail significant resources and are mostly projects of a high longevity.<sup>27</sup> This clause allows investors to make informed decisions regarding their long-term commitments. It, on the other hand, facilitates a smooth transition in the face of withdrawal which implicates contractual changes.<sup>28</sup> Consequently, when a Contracting Party withdraws from the ECT, a transitional situation layers the investors to adjust their actions accordingly.

Contrarily, this is detrimental from an environmental perspective. The sunset clause manifests as a building block that hinders withdrawing Parties to fully commit with their green commitment. A striking example of this challenge can be observed from Italy. Since its withdrawal in January 2016 took effect,<sup>29</sup> Italy has been sued by the investors for 7 times invoking the sunset clause,<sup>30</sup> for the same regulatory measures: the Conto Energia Decrees. Conto Energia Decrees refer to implementing regulation issued in the form of decree by the Ministers. The enabling regulations of the 5 Conto Energia Decrees are the EU-level legislative act setting out the goal for all EU Member States, namely, EU Directive 2001/77/EC which was amended and repealed by EU Directive 2009/28/EC.<sup>31</sup>

The recurrence of such lawsuits targeting Italy is a clear indication that the risks associated with the sunset clause are not limited to a single withdrawing Party. If Italy faces legal challenges under the sunset clause, there is no guarantee that other withdrawing Parties are not under the same risk. Consequently, any measure taken to fulfill the green commitments runs the risks of triggering legal action, thereby delaying progress for another leap of 20 years. However, we cannot afford to wait until 2043, as coordinated withdrawal from the ECT has not been universally taken by all Contracting Parties in 2023. Thus, how long must we wait? Climate change cannot wait. Amendment of the sunset clause is of top priority in order to overcome this obstacle and enable meaningful progress towards a sustainable future.

## B. Can The Deletion of Sunset Clause Serve the Object and Purpose of ECT?

While object and purpose are not explicitly required to be observed in the amendment of a treaty, it is important to note that the in interim obligation,<sup>32</sup> Interpretation of treaty,<sup>33</sup> reservation,<sup>34</sup> the drafting of *inter se* agreement,<sup>35</sup> and suspension,<sup>36</sup> object and purpose forms a very core of the points of consideration. In some cases, states may choose to amend a treaty to

<sup>27</sup> Naihua Jiang, Wang Liping, and Kishor Sharma, "Trends, Patters and Determinants of Foreign Direct Investment in China," *Global Business Review* 14, no. 2 (2013): 201–10.

<sup>28</sup> Salamah Ansari and R Rajesh Babu, "5. North American Free Trade Agreement (NAFTA)," *Yearbook of International Environmental Law* 29 (2018): 1.

<sup>29</sup> "Italy," accessed June 16, 2023, <https://www.energycharter.org/who-we-are/members-observers/countries/italy/>.

<sup>30</sup> See: Rockhopper et al v Italy, ICSID Case No. ARB/17/14, Award 23 August 2022; ESPF Beteiligungs Gmbh et al v Italy, ICSID Case No. ARB/16/5, Award 14 September 2020; VCHolding II Sarl et al v Italy, ICSID Case No. ARB/16/39; Sun Reserve Luxco Holdings Sarl et al v Italy, SCC Case No 132/2016, Award 25 March 2020; Veolia Propreté SAS v Italy, ICSID Case No. ARB/18/20; Hamburg Commercial Bank v Italy, ICSID Case No. ARB/20/3; Encavis et al v Italy, ICSID Case No. ARB/20/39.

<sup>31</sup> Giovanni Dall'Agnola, "Italy's Reduction of Existing Renewable Energy Incentives: The Ruling of the CJEU on the Compatibility of the Spalma-Incentivi Decree with EU Law," *Diritto Del Commercio Internazionale*, 2021, 782–791.

<sup>32</sup> Vienna Convention of the Law of Treaties, Art. 18.

<sup>33</sup> Vienna Convention of the Law of Treaties (1969), Art. 31-3.

<sup>34</sup> Vienna Convention of the Law of Treaties (1969), Art. 19(c).

<sup>35</sup> Vienna Convention of the Law of Treaties (1969), Art. 41(1)(b)(ii).

<sup>36</sup> Vienna Convention of the Law of Treaties (1969), Art. 5(1)(b)(ii).

ensure that it remains aligned with its object and purpose or to address evolving circumstances, as is faced in the ECT. Therefore, assuming that a treaty's object and purpose is its essential content, then any amending a treaty or any changes to it must therefore not violate the essential content. However, VCLT merely provides the most basic procedures and general rule for the amendments of treaties whereby it necessitates that "a treaty should be amended by agreement between the parties." Therefore, amendments are typically governed by the provisions set out in the treaties themselves or through subsequent agreements between the parties.<sup>37</sup>

### 1) Amendment Procedure Under ECT

Unlike some treaties that provide multiway procedures of amendment,<sup>38</sup> the ECT goes with the general procedure. Article 42 of the ECT sets forth that a Contracting Party may propose specific amendments to the ECT through the text of any proposed amendment addressed to the ECT Secretariat which later will be communicated to the Contracting Parties at least three months prior to the date on which it is proposed for adoption by the Charter Conference. Charter Conference functions as the main institutional body which possesses the political responsibility for the implementation of the treaty and its related instruments.<sup>39</sup> The voting process for an amendment requires unanimity. Secretariat later shall relay the amendment texts adopted by the ECT Conference to the Depositary, which shall submit them to all Contracting Parties for ratification, acceptance or approval.<sup>40</sup> The Secretariat is a treaty body that stands in a perfect position for providing administrative support, granting the necessary assistance in the consultation process, and allowing the circulation of proposals of the amendments. In the absence of such a treaty body, the Secretary-General of the United Nations being the treaty depositary may be tasked with this function.<sup>41</sup>

To date, ECT has been the subject of the winds of change sweeping through its provisions, leading to two significant amendments in 2010 and in 2022. Initiated in 1998, the Contracting Parties embarked on a mission to enhance the trade-related provisions of the ECT by replacing the references to the General Agreement on Tariffs and Trade ("GATT") provisions under the ECT with the relevant WTO provisions and expanding the scope of trade regulations.<sup>42</sup> The endeavor resulted in the birth of the Trade Amendment (TA) of the ECT<sup>43</sup> which entered into force in 2010 following its ratification by an impressive cohort of 35 Contracting Parties. Secondly, initiated in 2017, the Contracting Parties set their sights to amend the ECT on two pivotal objectives post-continuous withdrawal: (1) bringing clarity to matters that had given rise to inconsistent arbitral rulings, specifically addressing the landscape of intra-EU ISDS in light of the judgments rendered by the CJEU in *Achmea* and *Komstroy*; and (2) ensuring the alignment of

<sup>37</sup> See: Protocol Amending the Single Convention on Narcotic Drugs (1972), this protocol outlines the specific amendments and the procedures to the original Single Convention on Narcotic Drugs (1961); Protocol to Amend the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (2005), this protocol sets out the procedures for implementing the amendments and specifies the requirements for the entry into force.

<sup>38</sup> See: United Nations Convention of the Law of the Sea (1982), Arts. 312-3; Treaty on the Functioning of the European Union (2009), Arts. 48, 48(6); Statute of the International Atomic Energy Agency (1957), Arts. XIV(A)-(B).

<sup>39</sup> Rafael Leal-Arcas, *Commentary on the Energy Charter Treaty* (Edward Elgar Publishing, 2018), 470.

<sup>40</sup> Energy Charter Treaty, Arts. 39, 42(3).

<sup>41</sup> Leal-Arcas, *Commentary on the Energy Charter Treaty*, 470.

<sup>42</sup> Energy Charter Secretariat, "The Energy Charter Treaty: A Reader's Guide," *Energy Charter Treaty* (Brussels, 2002), 14–15.

<sup>43</sup> Wen-Chen Shih, "Energy Security, GATT/WTO, and Regional Agreements," *Nat. Resources J.* 49 (2009): 433.

the ECT with the pressing challenges posed by climate change and the green commitment.<sup>44</sup> The culmination of this amendment is materialized in the Agreement in Principle.<sup>45</sup> Armed with this knowledge, it becomes clear that the amendment to the ECT is neither an arduous nor an insurmountable task. Rather, it represents a significant stride forward on the path toward a more robust and responsive energy framework.

## 2) Can It Still Serve?

The concept “object and purpose” embodies a term of art which lacks a readily discernible and operational definition.<sup>46</sup> In its broader connotation, object and purpose may be defined as a treaty’s indispensable goals; the distilled essence permeating its very core.<sup>47</sup> To derive it from a treaty, there are two approaches emerge: (1) textual approach, which is manifested In the written text of the treaty; and (2) subjective approach, which delves into the underlying intent harbored within the minds of the treaty’s drafters.

From a textual analysis which involves the body of the ECT and its preparatory work, a derivation of the Object and purpose of the ECT can be attained. In this method, the preamble assumes a pivotal role to navigate the object and purpose of a treaty.<sup>48</sup> Preliminarily, the ECT’s preamble references the 1991 European Energy Charter (“EEC”).<sup>49</sup> Within Title 1: Objective of the EEC, it is stipulated that “[t]he signatories are desirous of improving security of energy supply and [...] to minimize environmental problems.”<sup>50</sup> In addition, the preamble unequivocally underscores the signatories undertaking “[t]o promote [...] efficient energy market [...] taking due account of environmental concerns.”<sup>51</sup> Differently, in the following subtitles, specifically in the promotion and protection of investments, EEC prescribes the importance of legally-binding agreements which safeguards high legal security and risk guarantee schemes.<sup>52</sup> By virtue of these two stipulations, it becomes apparent that the ECT accords significant priority to both the environmental and investment interests. Hypothetically, an amendment to reduce investors’ protection under Article 47(3) of the ECT will not defeat object and purpose. A non-detrimental reduction of the sunset clause will help to strike a balance inherent to the ECT, that is promoting and protecting the investment without disabling the environmental protection. In retrospect, Annex 1 to the Final Act of the European Energy Charter Conference makes clear that the specific nature of the Treaty is aimed to be ‘a legal framework to promote long-term cooperation.’<sup>53</sup> This stipulation particularly affirms the ECT’s aspiration to longevity.

<sup>44</sup> Toby Fisher, “The Modernised Energy Charter Treaty: The New Text - Kluwer Arbitration Blog,” Kluwer Arbitration Blog, 2022,

<https://arbitrationblog.kluwerarbitration.com/2022/10/15/the-modernised-energy-charter-treaty-the-new-text/>.

<sup>45</sup> Bart-Jaap Verbeek, “The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?,” *Business and Human Rights Journal* (2023): 97.

<sup>46</sup> David S. Jonas and Thomas N. Saunders, “The Object and Purpose of a Treaty: Three Interpretive Methods,” *Vanderbilt Journal of Transnational Law* 43 (2010): 567.

<sup>47</sup> Isabelle Buffard and Karl Zemanek, “The “Object and Purpose” of a Treaty: An Enigma?,” *Austrian Review of International and European Law Online* 3, no. 1 (1998): 311, 343.

<sup>48</sup> Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press, 1984), 130.

<sup>49</sup> Energy Charter Treaty, Preamble.

<sup>50</sup> Concluding Document of the Hague Conference on the European Energy Charter, Title 1. Accessible in [https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1991\\_European\\_Energy\\_Charter.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/1991_European_Energy_Charter.pdf).

<sup>51</sup> Concluding Document of the Hague Conference on the European Energy Charter, Title I.

<sup>52</sup> Concluding Document of the Hague Conference on the European Energy Charter, Title II.

<sup>53</sup> Annex 1 to the Final Act of the European Energy Charter Conference. Accessible here: <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>

Conversely, enshrined within the main text of the ECT, affirmed in the Article 2, the ECT seeks to '[e]stablishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter.<sup>54</sup> The Charter, in accordance with Article 1, refers to the EEC. Returning to the EEC, it emphasizes the importance of both environmental protection and investment interests. However, the prevailing focus on safeguarding investment is more often cited as the contextual lens through which the interpretation of the ECT should be made.<sup>55</sup> Nonetheless, the equilibrium struck among these legal instruments shows that it does not unilaterally prioritize investment interests, rather, due consideration is also given to environmental protection.

Before delving into the subjective approach to find the Object and purpose of the ECT, it is essential to acknowledge that this approach is more suitable on determining a treaty's object and purpose instead of defining the meaning of specific terms within the treaty.<sup>56</sup> Indeed, the object and purpose refers to the aim that functioned as the driving force behind the drafting and ratification of a treaty. Consequently, it is inherently valid to examine the motives of the individuals and institutions that held those goals. By doing so, an understanding of the Object and purpose of the ECT can be derived.

Historically, energy supplies, particularly coal, became a major priority to facilitate European industrial reconstruction, specifically during the post-war recovery in the 1950s and 1960s.<sup>57</sup> The energy-hungry European States, with the reducing reliance to coal, shift towards the oil, and interest in nuclear, driven by the need to meet escalating electricity demand, necessitated substantial capital investments to develop infrastructure and expand power generating capacities. In 1970s, as the oil energy rose into popularity, the Middle-Eastern States tripled the price of crude oil per barrel, thereby instigating an oil crisis which affected all oil-dependent States. The revolution in Iran also played a pivotal role in fuelling the crises, resulting in the oil panic buying.<sup>58</sup> Such crises, as Haugland terms, "[r]einforced and established in an entire generation of policy makers a world-view centered on energy security."<sup>59</sup>

The major shift from securing energy supplies shifted after the nuclear accidents in at Three Mile Island in 1979<sup>60</sup> and Chernobyl in 1986.<sup>61</sup> In Europe during such period faced dilapidation of the quality of the environment: acid rain,<sup>62</sup> decrease of water quality,<sup>63</sup> and industrial waste.<sup>64</sup> These led to the pressure exerted by environmental activists and civil societies

<sup>54</sup> Energy Charter Treaty, Art. 2.

<sup>55</sup> See: Kaj Hobér, *The Energy Charter Treaty: A Commentary* (Oxford University Press, 2020), 143.

<sup>56</sup> Jonas and Saunders, "The Object and Purpose of a Treaty: Three Interpretive Methods," 581.

<sup>57</sup> Ludmilla Katherine Robinson, "Altruism or Eurocentrism?: The Energy Charter Treaty, Direct Foreign Investment in Energy Resources and Infrastructure, and the Treaty's Implications for Australia" (2003), 13.

<sup>58</sup> Walter J Levy, "Oil and the Decline of the West," *Foreign Affairs* 58, no. 5 (1980): 999–1015.

<sup>59</sup> Torleif Haugland, Helge Ole Bergesen, and Kjell Roland, *Energy Structures and Environmental Futures* (Clarendon Press, 1998), 3.

<sup>60</sup> See: J. Samuel Walker, *Three Mile Island: A Nuclear Crisis in Historical Perspective*, vol. 41 (Univ of California Press, 2004).

<sup>61</sup> Nathalie L. J. T. Horbach, "Nuclear Protocol of the Energy Charter Treaty," *Journal of Energy & Natural Resources Law* 13, no. 3 (1995): 163–77.

<sup>62</sup> Paul R Josephson, "Chernobyl and Its Aftermath," *Slavic Review* 50, no. 3 (1991): 682.

<sup>63</sup> Pavel Povinec, Scott Fowler, and Murdoc Baxter, "Chernobyl & the Marine Environment: The Radiological Impact in Context," *IAEA Bulletin* 38, no. 1 (1996): 18; Oleg Voitsekhoivitch et al., "Water Quality Management of Contaminated Areas and Its Effects on Doses from Aquatic Pathways," 1996, 401.

<sup>64</sup> Iris Borowy, "Hazardous Waste: The Beginning of International Organizations Addressing a Growing Global Challenge in the 1970s," *Worldwide Waste: Journal of Interdisciplinary Studies* 2, no. 1 (2019): 1.

to compel the governments of European States to adopt environmental protection policies and integrate environmental considerations into every facet of economic development.

Following the collapse of the Soviet Union, the end of Communist rule in central and eastern Europe, and the lifting of the Iron Curtain, the Western European States sought to address their needs towards the energy that were previously hindered due to the Iron Curtain. On the other hand, Russia and the newly-established former Soviet Union States possessing abundant energy reserves needed major investments to ensure their development.<sup>65</sup> There was therefore a recognised need to ensure that a commonly accepted framework for fostering energy cooperation among them. It was against this historical background and in the face of an uncertain future and major reliance towards energy, in 1990, the drafting process of the ECT was initiated. Similar to the textual analysis, the subjective approach showcases that the underlying reasons as to the inception of the ECT is not merely curbed to to flourish investment, but also to protect the environment, which eventually leads to energy security.

In light of the foregoing analyses of both approaches, it becomes unequivocally evident that the reduction of the 20-year protection provided by the sunset clause would not defeat the object and purpose of the ECT. It is crucial to recognize that the object and purpose of the ECT emanate from two fundamental pillars: the preservation of the environment and the protection of investment, ultimately aiming to foster effective energy co-operation. Therefore, these two pillars must be construed in an equilibrium to safeguard the object and purpose from any injury that will defeat them. Suppose the Object and purpose of the ECT is interpreted in a way that it disregards the investment, it would result in an impairment of the object and purpose itself. Similarly, if the interpretation is solely placed on the environment without due consideration for the investment, it would likewise undermine the object and purpose of the ECT. Will injure the object and purpose. Moreover, the sunset clause was not the core draft until Japan expressly made concern out of it.<sup>66</sup>

This will not produce the same answer if the scenario is altered to the deletion of the sunset clause. While it is theoretically attractive, the deletion of the sunset clause in the ECT will only be environmentally feasible. Aside from politically arduous, deleting the sunset clause risks a devastating consequence of major instability. History has shown that instability often leads to political upheaval<sup>67</sup> and the rise of ideological extremism.<sup>68</sup> An unstable state poses a significant threat to domestic harmony and peace, and it is not far-fetched to consider the potential implications for international peace and security. Therefore, careful consideration must be given to the potential consequences before entertaining the idea of deleting the sunset clause.

## Conclusion

Urban Rusnák, the ECT Secretary General, has said in an interview that, “[i]f the modernisation process fails [meaning it hampers the ability to meet the Paris Agreement], I don’t see a future

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<sup>65</sup> Andrei Konoplyanik and Thomas Walde, “Energy Charter Treaty and Its Role in International Energy,” *J. Energy Nat. Resources L.* 24 (2006): 524.

<sup>66</sup> European Energy Charter Conference Secretariat, “Basic Agreement,” 1992, 73, [https://www.energycharter.org/fileadmin/DocumentsMedia/ECT\\_Drafts/4\\_-\\_BA\\_6\\_\\_21.01.93\\_.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/ECT_Drafts/4_-_BA_6__21.01.93_.pdf).

<sup>67</sup> *Read more*: 1998-2002 Argentine Great Depression.

<sup>68</sup> Arshad Ali, “Internal Instability in Pakistan-Ideological and Socioeconomic Perspectives,” *Strategic Studies* 31, no. 1/2 (2011): 91.

for the Treaty.”<sup>69</sup> Maybe he was correct: there is no future for the ECT. The analyzes from the two approaches of the object and purpose of a treaty have found that the object and purpose of the ECT is to enhance energy co-operation among States and such must be done with due consideration to the environment and investment. Despite the lengthy emphasis placed on the investment pillar throughout the operation of the ECT, the environmental aspect has been relegated to a non-binding provision in the modernized ECT.<sup>70</sup> The curbed interpretation of the object and purpose of the ECT to the investment circle only have evidently become the aggravating trigger that induced many (former) green commitment-compliant Contracting Parties of the ECT to withdraw.

However, the end of the ECT is not near. It is conditioned upon the collective and proactive action undertaken by the Contracting Parties to instigate a substantial transformation of the ECT. The crucial step towards this transformation is in the reduction of the 20-year protection of the sunset clause. By embarking on this brave endeavor, the Contracting Parties would stop the misconception of the object and purpose of the ECT which was previously taken, and more importantly, signify their commitment to revitalizing the ECT and ensuring its continued relevance to the challenges that States faced globally, *inter alia*, the emerging climate change that would not be selective in choosing its victim. Only through the implementation of effective and tangible collective actions, the Contracting Parties are empowered to upgrade the ECT, to fully modernize it, and re-frame its significance in fostering sustainable energy cooperation, maintaining economic interest, and addressing contemporary environmental concerns.

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<sup>69</sup> Karel Beckman, “Interview: A New Energy Charter Treaty as a Complement to the Paris Agreement,” *Borderlex*, 2020, <https://borderlex.net/2020/06/18/interview-a-new-energy-charter-treaty-as-a-complement-to-the-paris-agreement-on-climate-change/>.

<sup>70</sup> See: *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction; *Cem Cengiz Uzan v. Republic of Turkey*, SCC Case No. V 2014/023, Award on Respondent Bifurcated Preliminary Objection; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Excerpts of Award; *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia*, UNCITRAL, Decision on Jurisdiction.

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