

STUDY

Requested by the JURI committee



Sunset Clauses in International Law and their Consequences for EU Law



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate-General for Internal Policies
PE 703.592 - January 2022

EN

Sunset Clauses in International Law and their Consequences for EU Law

Abstract

Sunset clauses in International Treaties account for numerous benefits. However, their entrenchment effect disproportionately burdens future policymakers.

This is the case of the Energy Charter Treaty, which poses unique challenges for two main reasons. First, compared to other treaties, the ECT contains a 20-year sunset clause. Second, the treaty is a multilateral with a rigid amendment procedure, which empowers the entrenchment effect of that treaty.

Within this context, the study explores the policy options to disengage from the ECT and the entrenchment effect of its sunset clauses.

This document was requested by the European Parliament's Committee on Legal Affairs.

AUTHORS

Antonios Kouroutakis, IE University, Madrid, Spain

ADMINISTRATOR RESPONSIBLE

Eeva PAVY

EDITORIAL ASSISTANT

Fabienne VAN DER ELST

LINGUISTIC VERSIONS

Original: EN

ABOUT THE EDITOR

Policy departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU internal policies.

To contact the Policy Department or to subscribe for updates, please write to:
Policy Department for Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
Email: poldep-citizens@europarl.europa.eu

Manuscript completed in August 2021
© European Union, 2022

This document is available on the internet at:
<http://www.europarl.europa.eu/supporting-analyses>

DISCLAIMER AND COPYRIGHT

The opinions expressed in this document are the sole responsibility of the authors and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© Cover image used under licence from Adobe Stock.com

CONTENTS

LIST OF ABBREVIATIONS	5
EXECUTIVE SUMMARY	7
1. ORIGINS, DEFINITION AND TYPOLOGY OF SUNSET CLAUSES IN INTERNATIONAL LAW	9
1.1. Introduction: the objective and approach of this study	9
1.2. Origin and definition of Sunset Clauses	10
1.3. The nature of Sunset Clauses	12
2. TYPOLOGY OF SUNSET CLAUSES	14
2.1. Entire and sectional	14
2.2. Direct and indirect	15
2.3. Conditional and unconditional	16
2.3.1. Expiration date based on a condition	16
2.3.2. Activation of the sunset clause based on a condition	18
2.4. Concluding remarks on the construction of the sunset clause	18
3. SUNSET CLAUSES IN INTERNATIONAL AGREEMENTS; BENEFITS AND CHALLENGES	20
3.1. Sunset clauses in multilateral and bilateral treaties	20
3.2. Sunset clauses in investment treaties	21
3.3. Sunset Clauses in Energy Charter Treaty	24
3.4. Rationale of Sunset Clauses in multilateral and bilateral treaties	26
3.4.1. Regulation of temporary and transitional issues	26
3.4.2. Safeguarding sovereignty	27
3.5. Rationale of Sunset Clauses in Investment Treaties	29
3.5.1. Legal protection to investors	29
3.5.2. Legal certainty in the interplay between stability and flexibility	31
4. LEGAL EFFECTS OF SUNSET CLAUSES IN INTERNATIONAL TREATIES AND THE IMPACT ON THE POWERS OF LEGISLATORS UNDER EU TREATIES	33
4.1. Legal Effect: temporary duration and entrenchment	33
4.1.1. Automatic expiration	33
4.1.2. Entrenchment effect of sunset clauses	34
4.2. Limit on legislative power	36
4.3. Legitimate expectations and the treaty making power	38
5. SUNSET CLAUSES IN ECT AND CONFLICT WITH OTHER TREATIES	42
5.1. Conflict between international agreements	42
5.2. The conflict between EU Treaties and other International Treaties	45

5.3. The conflict between EU Treaties and the ECT	47
5.3.1. The approach of Investment Tribunals before <i>Komstroy</i>	47
5.3.2. CJEU and the <i>Komstroy</i> Decision	49
5.4. The conflict between ECT and Paris Agreement	50
6. CONCLUSIONS AND POLICY RECOMMENDATIONS	53
6.1. Remaining in the ECT and raising procedural and substantive objections before investment tribunals	53
6.1.1. Procedural objections	53
6.1.2. Substantive objections	55
6.2. Withdrawal the sooner the better?	55
6.3. The in-advance expiration of the ECT	56
6.3.1. The termination of the ECT	56
6.3.2. Termination of the ECT with the adoption of a new Energy Treaty	57
6.4. The revision of the ECT	58
6.4.1. Agreement to amend the duration of the sunset clause	58
6.4.2. Agreement to amend the substantive content of the ECT	60
6.5. The <i>ultimum refugium</i> of the modification of the ECT among the Member States of the EU and then termination	60
6.6. Concluding remarks	61
REFERENCES	63
APPENDIX	66
Energy Charter Treaty	66
Vienna Convention of the Law of the Treaties	68
Treaty on the Functioning of the European Union	69
Paris Agreement	69

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
BIT	Bilateral Investment Agreement
CETA	Canada – EU Comprehensive Economic and Trade Agreement
EC	European Commission
ECJ	European Court of Justice
ECSC	European Community of Steel and Coal
ECT	Energy Charter Treaty
EU	European Union
Euratom	European Atomic Energy Community
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
IIA	Interstate Investment Agreement or International Investment Agreement
IIED	International Institute for Environment and Development
ILC	International Law Commission
IPPA	Investment Promotion and Protection Agreements
MAI	Multilateral Agreement on Investment
NAFTA	North American Free Trade Agreement
NDCs	Nationally Determined Contributions
OECD	Organisation for Economic Co-operation and Development
SALT I	Interim Agreement Between the United States and the Union of Soviet Socialist Republics on Certain Measures With Respect to the Limitation of Offensive Arms
SALT II	Treaty Between The United States of America and The Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms

SCM Agreement	WTO Agreement on Subsidies and Countervailing Measures
Start I	Strategic Arms Reduction Treaty I
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPP	Trans-Pacific Partnership
USMCA	United States – Mexico – Canada Agreement
UNCITRAL	United Nations Commission On International Trade Law
VCLT	Vienna Convention on the Law of Treaties
VCLT 1986	Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations

EXECUTIVE SUMMARY

In the field of international law, the use and utility of sunset clauses has remained largely unnoticed despite the fact that they have been employed in major international treaties and agreements.

The construction of sunset clauses varies, as there is no specific configuration. However, in specific types of treaties, the construction of sunset clauses included took a standardized form. The identification and documentation of the major classifications of sunset clauses is necessary for understanding, first, their legal effect, and second, the variety of options such clauses provide to policy makers and drafters of treaties.

The typology of sunset clauses between entire and sectional, direct and indirect, and conditional and unconditional underlines that they are a flexible legal mechanism that can fulfill a variety of public policy purposes.

There is the assumption that the temporary validity of treaties accounts for a number of benefits. Obviously, the regulation of temporary and transitional issues is one of them, but also such clauses play a key role in safeguarding the sovereignty of the states. With the utility of sunset clauses in investment agreements, more benefits emerge. Nowadays, such clauses have become a core feature in international investment agreements, playing an underappreciated role with the ability to enhance legal certainty in regards to the tension between stability and flexibility. Moreover, sunset clauses complement the protection to investors with the entrenchment effect.

However, with the entrenchment effect of sunset clauses in relation to investments, particularly if the duration is too long, disproportionately burdens future policymakers and lawmakers. This is the case of the 20-year sunset clause in the Energy Charter Treaty (ECT), which offers protection to investments already made in the energy sector. Provisionally, such a clause is triggered in case of unilateral withdrawal, unless the construction of the clause has defined differently. Such a long duration is not unique to the ECT. For instance, the recently agreed bilateral investment agreements between the EU and Singapore, and the EU and Vietnam also contain sunset clauses with long duration, 20 years the former and 15 years the latter.

The entrenchment effect of the ECT provisions due to the sunset clause, contradicts the Court of Justice of the European Union (CJEU) on whether Article 26 of the ECT is compatible with EU law clearly stated in the *Komstroy* decision, and in practice concerns the commitments of the EU and the EU Member States vis a vis the Paris Agreement.

In relation to the *Komstroy* decision, CJEU on 2 September 2021, stated that investment arbitration according to Article 26 of the ECT at the intra-EU level is not compatible with EU law, echoing its previous ruling in the *Achmea* decision.

On the other hand, the Paris Agreement is the reigning legal text on all matters concerning climate change and the environment under the UNFCCC. Such Agreement requires the members to reduce their carbon footprint and implement significant changes to their infrastructure to one that is more sustainable. On the other hand, the ECT protects the usage and sale of fossil fuels (such as coal) as it is a very lucrative industry. As it stands, if signatory states to the ECT wish to exit the treaty in order to comply with the provisions of the Paris Agreement may find themselves in the following paradoxical position.

The ECT's sunset clause requires signatory states who wish to exit to comply with its provisions for 20 years; hence, posing an immense challenge. On the top of that, what makes the ECT a distinct case is

the combination of different features. Apart from the 20-year sunset clause, ECT is a multilateral treaty. By default, multilateral treaties are more difficult to amend with a very rigid amendment procedure requiring unanimity. Therefore, the entrenchment effect of the ECT and the limits imposed on the agenda of policymakers at the EU level is unparalleled.

Fortunately, the legal effect of sunset clauses could be limited if not eliminated under certain conditions. This study presents different scenarios that could lead to a positive outcome. In particular, it explores the option of (i) remaining in the ECT, complying with the spirit of the Paris Agreement, and raising procedural and substantive objections before Investment Tribunals.; (ii) mutual termination of the ECT; (iii) the amendment of the duration of the 20-year sunset clause; (iv) the revision of the ECT to make its substantive provisions more compatible with the spirit of the Paris Agreement, and (v) the unconventional approach of the modification of the sunset clause in ECT between certain of the Parties, namely between EU Members States and the EU, followed by their withdrawal. Nonetheless, the Treaty protection for investments already made will endure for the remaining Parties to the ECT according to the 20-year sunset clause.

The impossibility to foresee every future eventuality when drafting rules that remain in force for an indefinite period of time creates obstacles. It is advised to avoid very rigid legal frameworks, unless the drafters of a legal document have a very good reason to establish a very stable a legal framework; namely a very stable legal framework is established with sunset clauses with long duration in combination with other entrenchment mechanisms such as initial validity periods, restrictions in the withdrawal process, and rigid amendment processes.

1. ORIGINS, DEFINITION AND TYPOLOGY OF SUNSET CLAUSES IN INTERNATIONAL LAW

1.1. Introduction: the objective and approach of this study

The aim of this study entitled 'Sunset clauses in international law and their consequences for EU law' is to elucidate the nature and utility of such clauses in international law, to chart their various versions and most importantly to assess their impact on the powers of policymakers and lawmakers at national and EU level.

As far as the contemporary treaty-making process is concerned, sunset clauses are either ignored or assumed to be used rarely. This is canvassed in the texts of the Vienna Convention on the Law of Treaties (VCLT) and in documents about the drafting of treaties, such as the Final Clauses Handbook prepared by the Treaty Section of the United Nations Office of Legal Affairs, which have no reference to such clauses. Recently, such clauses attracted the interest of policymakers and academics due to their extensive use in investment treaties.¹ Despite the fact there is discussion on sunset clauses, there have been no attempts to systematically analyse such clauses, and there is no analysis as to why drafters of treaties included such clauses, in which types of treaties are included or to what extent national sovereignty influenced their use and vice versa. Additionally there was minimal analysis as to the normative implications of their current use.

There is an assumption that the temporary applicability of treaties accounts for a number of benefits, such as the regulation of temporary and transitory issues, the retention of sovereignty, the creation of consensus among different parties, the entrenchment of some treaties, or the regulation of sensitive topics requiring a delicate balance between flexibility and stability. However, these benefits, depend heavily on the construction of the clause.

Thus this study provides an in-depth examination of sunset clauses in the international system in relation to EU law and begins by setting the framework of sunset clauses with a positive analysis of its contemporary utility, as well as the typology and the legal effect of such clauses. Generally, this study aims to open a discussion about how secondary rules, such as sunset provisions – according to Hart's classification² between primary and secondary legal rules - affect, influence and interact with the international system.

In particular, the study will examine the case of the Energy Charter Treaty (ECT)³. Compared to other treaties and international agreements that include sunset clauses, the ECT poses unique challenges for two main reasons. Primarily, the ECT contains a 20-year sunset clause. Such a sunset clause is triggered when a contracting party unilaterally withdraws offering extra protection to investments already made

¹ Eirini Kikarea, *Brexit and Preferential Trade Agreements: Issues of Termination and Survival Clauses* (2019) 46 *Legal Issues of Economic Integration* 53; Catharine Titi, *Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law* (2016) 33 *Journal of International Arbitration* 425; Tania Voon and Andrew D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law* (2016) 31 *ICSID Review* 413; Anthea Roberts, *'Triangular treaties: the nature and limits of investment treaty rights'* (2015) 56 *Harvard International Law Journal* 353; Tania Voon, Andrew Mitchell, James Munro, *Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights'* (2014) 29 *ICSID Review* 451; James Harrison, *The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties* (2012) 13 *The Journal of World Investment & Trade* 928.

² On the classification between primary and secondary legal rules, see HLA Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, OUP 2012) 79ff.

³ Energy Charter Treaty 2080 UNTS 100. ECT 1994,

as certain treaty provisions will still apply even after the Treaty's termination for the withdrawing contracting party (in terms of typology, this is a sectional sunset clause). This is the so-called entrenchment effect of sunset clauses. Secondly, the ECT is a multilateral treaty with a very rigid amendment procedure, which empowers the entrenchment effect of the Treaty.

Such entrenchment effect of the ECT provisions, for instance, results in the following: While the Court of Justice of the European Union (CJEU) stated in the *Komstroy* decision⁴ that investment arbitrations at an Intra-EU level according to Article 26 of the ECT are incompatible with EU law, the arbitral tribunals preserve the jurisdiction to solve disputes between an EU Member State - as a host state- and an investor of another EU Member State concerning an investment made by the latter in the former EU Member State.

Furthermore, the contracting Parties to the Paris Agreement are in a paradoxical position; on the one hand, to preserve already made investments in fossil fuels, and on the other hand to design nationally determined contributions with the aim to reduce national emissions and adapt to the impacts of climate change.

Within this context, the study will first examine sunset clauses in international law treaties from a positive law perspective, and then conclude with the available policy options and recommendations to disengage from the entrenchment effect of such clauses. In particular, this study will begin with the definition of sunset clauses, and their scope. It will differentiate sunset clauses from duration clauses and survival clauses. Then continue with the typology of sunset clauses and their legal effect. Following this analysis, the study will examine different international treaties subject to sunset clauses and the rationale for the inclusion of sunset clauses in international treaties. It will explore the relationship between EU law and the ECT as well as the relationship between ECT and the Paris Agreement, and will conclude with different policy options. In relation to the policy options, it will begin with the policy to remain in the ECT and raise procedural and substantive objections before investment tribunals, the option of mutual termination of the ECT, the shortening of the duration of the 20-year sunset clause, the revision of the ECT to make its substantive provisions more compatible with the spirit of the Paris Agreement and finally the unconventional approach of modification of the ECT between certain Parties, namely the EU Members States and the EU, and then their withdrawal from the ECT.

1.2. Origin and definition of Sunset Clauses

Laws at national and international levels are regarded as being in force until amended, revised, reformed, or repealed, while through the inclusion of a sunset clause, the duration of the law is defined and thus the law is commonly addressed as temporary. As the name of sunset clauses suggests, the duration of laws expires, just as the sun sets.

Sunset clauses provide that a treaty lapses automatically *erga omnes* (or for certain subjects) on (i) a fixed and precise date or (ii) after the passage of a specified, determined period of time.⁵ For instance,

⁴ Case C-741/19, Republic of Moldova v Komstroy, a company the successor in law to the company Energoalians, Judgment of 2 September 2021 (ECLI:EU:C:2021:655). For more analysis on this decision, see Part 5.3.

⁵ Sunset clauses are defined by the Latham & Watkins Glossary of International Arbitration Terminology and Acronyms as 'a Treaty provision that stipulates that certain requirements will still apply even after the Treaty's termination. In the context of BITs, a Continuing-Effects Clause may stipulate that investments made prior to the Treaty's termination will continue to benefit from the Treaty's protections for a certain period.' See The Book of Jargon, International Arbitration (Latham & Watkins, 2020, 1st ed.) [sunset clause]. However, this definition captures only one aspect of the legal effects

a treaty would lapse automatically on a fixed date when the sunset clause defines that 'the treaty would expire on December 2021'. On the other hand, a treaty would expire after the passage of a period of time when the sunset clause defines that 'the Treaty is concluded for a period of fifty years from its entry into force.'

Sunset clauses refer to the end of the life of the treaty, and their exact contrasting clause is the commencement clauses, which define the start of the life of the treaty.⁶ By including a sunset clause in a provision of a treaty, such treaty is rendered of temporary nature with a limited lifespan, opposed to permanent laws and treaties, which aim to stay in force perpetually.⁷

The term 'sunset clauses' was coined and its use was popularised in the US in the 1970s after the Watergate scandal.⁸ Within literature, such a clause is also described with different terms. At the national level, we find the terms time-limitation clause,⁹ duration clause,¹⁰ or a temporary provision.¹¹ At the international level, especially in treaties in relation to investments, we find the terms 'continuing effects clause',¹² 'transitional provisions',¹³ 'grandfather clauses'¹⁴ or 'survival clauses'.¹⁵

Although it is possible that those terms are used interchangeably, they are not always synonymous with the term sunset clause. Indeed, there is some overlap between them, but they are

of such clauses, which is the entrenchment. In particular, this definition does not include the automatic expiration. For more details about the distinction between a sunset clause and a survival clause see below text to n 16.

⁶ Helen Xanthaki, 'Sunset Clauses: A Contribution to Legislative Quality' in Sofia Ranchordás and Yaniv Rosnai, *Time, Law, and Change: An Interdisciplinary Study* (Hart 2020) 210.

⁷ An example of an intended permanent Treaty, is the Treaty of Peace between France and the Empire, signed at Münster, 14(24) October 1648, 1 CTS 271, establishing the Peace of Westphalia. See Article 17 paragraph 2 'For the greater firmness of all and every one of these articles, this present treaty shall serve for a perpetual law...'. Recently, the 1972 Anti-Ballistic Missile (ABM) Treaty between USA and USSR according to article 15 was intended to be 'of unlimited duration' See Anti-Ballistic Missile (ABM) Treaty, May 26, 1972, Article 15 paragraph 1 'This Treaty shall be of unlimited duration.' At EU level the Treaty of Nice in article 11 prescribed that 'This Treaty is concluded for an unlimited period'. See European Union, Treaty of Nice, Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 11 December 2000, Official Journal C 80 of 10 March 2001; 2001/C 80/01. Furthermore, the 1989 Alcoholic Beverages Agreement between Canada and the EU in Article 8 prescribes that 'This Agreement shall be of indefinite duration.' See Agreement Between Canada and the European Community Concerning Trade and Commerce in Alcoholic Beverages E100679 - CTS 1989 No.4. In relation to permanent treaties Aust remarks that 'many bilateral treaties make no provision for duration and their subject matter is such that they could remain in force indefinitely' see Anthony Aust, *Modern Treaty Law and Practice* (CUP, 2007, 2nd ed.) 278.

⁸ The term was originally suggested by 'Common Cause', a non-party organisation founded in 1970. Such organization advocated that with the inclusion of sunset clauses in legislation, accountability in the political system will be enhanced. However, the term sunset clause was first used in debtor law in the UK. For more details, see Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses* (Routledge 2017) 4.

⁹ David Dean, *Law-making and Society in Late Elizabethan England* (CUP 1996) 259.

¹⁰ Courtenay Ilbert, *Legislative Methods and Forms* (Clarendon Press 1901) 279.

¹¹ For instance, see Prevention of Terrorism (Temporary Provisions) Act 1989 (UK).

¹² See Jeswald W. Salacuse, *The Law of Investment Treaties* (OUP 3rd edition) 489.

¹³ Anthony Aust, *Modern Treaty Law and Practice* (CUP, 2007, 2nd ed.) 286.

¹⁴ James D. Fry and Odysseas G. Repousis, 'Intertemporality and international investment arbitration: protecting the jurisdiction of established tribunals' (2015) 31 *Arbitration International* 213, 220.

¹⁵ Eirini Kikarea, *Brexit and Preferential Trade Agreements: Issues of Termination and Survival Clauses* (2019) 46 *Legal Issues of Economic Integration* 53; Catharine Titi, *Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law* (2016) 33 *Journal of International Arbitration* 425; Tania Voon and Andrew D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law* (2016) 31 *ICSID Review* 413; Anthea Roberts, 'Triangular treaties: the nature and limits of investment treaty rights' (2015) 56 *Harvard International Law Journal* 353; Tania Voon, Andrew Mitchell, James Munro, *Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights* (2014) 29 *ICSID Review* 451; James Harrison, *The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties* (2012) 13 *The Journal of World Investment & Trade* 928.

not identical or coterminous. For instance, a typical survival clause is included in the ICSID Convention in Article 72. Article 72 provides that 'Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary'. This provision is not a sunset clause because it does not contain automatic expiration.¹⁶ In addition, the Montreux Convention, which was signed on 20 July 1936 provides that 'the present Convention shall remain in force for twenty years from the date of its entry into force'.¹⁷ Such provision is a duration clause and not a sunset clause, as at the end of the 20-year period, the law would not expire automatically. Such duration clauses are included in international agreement to guarantee, for instance, an initial and minimum validity.¹⁸

1.3. The nature of Sunset Clauses

Prevailing wisdom restricts the utility of sunset clauses to regulate temporary and transitory issues. Sunset clauses constitute a critical and underappreciated lever of regulation. Diachronically the use of these clauses transcended the boundaries of different legal disciplines. In particular, such clauses are present in a plethora of legal fields at international level, ranging from disarmament treaties to international investment agreements.

To clarify here, these type of clauses such as duration clauses and sunset clauses are rules about rules. Their normative content is, in nature, procedural to define the duration and the automatic expiration of substantive rules. For instance, in investment treaties, a set of substantive provisions define the special protection dedicated to investments. Sunset clauses simply regulate the duration of the special protection. The substantive provisions according to Hart's classification, are primary legal rules, because they are rules of conduct defining obligations, prohibitions or permissions and are addressed to the subjects.¹⁹ On the other hand, sunset clauses set up the duration of the validity of such primary legal rules, and according to Hart's classification they are secondary legal rules. In general, secondary legal rules are addressed to primary legal rules and define their creation, extinction, duration or alteration. Within Hart's classification, sunset clauses set the automatic expiration of primary legal rules, regardless of their content.

Accordingly, secondary legal rules such as the aforementioned sunset clauses do not conflict with primary rules, which pose obligations, for instance, on the protection of the environment or prohibitions, or about the preservation of investments in fossil fuel. In other words, **it is the primary rules that may be in conflict while secondary rules such as sunset clauses define the duration and automatic expiration of the primary rules.**

¹⁶ For more analysis on this provision see Emmanuel Gaillard, "The Denunciation of the ICSID Convention" (26 June 2007) *New York Law Journal* 1

¹⁷ Montreux Convention Regarding the Regime of the Straits, 20 July 1936, Article 28.

¹⁸ According to an OECD report, from a sample of 2061 Interstate Investment Agreements (IIAs) on average, the initial validity period is over 21.5 years when a treaty is brought into effect. See Joachim Pohl, 'Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions' OECD Working Papers on International Investment, 2013/04, 19.

¹⁹ On the classification between primary and secondary legal rules see HLA Hart, *The Concept of Law* (Paul Craig ed, 3rd edn, OUP 2012) 79ff.

However, in the event the application of a sunset clause would lead to a conflict or an overlap between the primary rules in two treaties: how such an overlap or conflict would be resolved is regulated by Articles 30 and 31 of the VCLT. As Shaw accurately clarifies, 'the rules laid down in Article 30 provide a general guide and in many cases the problem will be resolved by the parties themselves expressly.'²⁰ In other words, Article 30 of the VCLT offers guidance on how a conflict will be resolved in case two treaties regulated the same subject matter. Such guidance does not prohibit the parties in two treaties with the same subject matter to include rules of conflict based on which they resolve conflicts.²¹

²⁰ Malcolm Shaw, *International Law* (CUP, 2008, 6th ed) 928.

²¹ For more analysis about the conflict between two treaties, see below Part 5.1.

2. TYPOLOGY OF SUNSET CLAUSES

Formally speaking, the construction of sunset clauses diverges, as there is no specific configuration. However, the construction of such clauses take on a standardized form especially when it becomes part of a specific type of treaty. **The identification and documentation of the major classifications of sunset clauses are necessary for understanding first, their legal effect and, second the variety of options such clauses provide to policymakers and drafters of treaties.**

In terms of the construction of the clause, sunset clauses have two major components (or variables): the scope of the clause and the expiration date. The systematic research on these two components, allows us to classify such clauses: (a), based on the scope of the clause (i) between entire and sectional sunset clause, or (ii) between direct or indirect sunset clauses, and, (b) based on the expiration date between conditional and unconditional.

2.1. Entire and sectional

The distinction between the entire and sectional sunset clause is a typology related to the construction of the clause, especially concerning its scope. **'Entire' classifies the sunset clause by reference to the treaty as a whole, providing the expiration of all provisions at the same time and *erga omnes*.** For instance, an entire sunset clause was included in the European Community of Steel and Coal (ECSC) according to which the treaty provisions expired *erga omnes*.²² In like manner, an entire sunset clause was included in the Russia – United Kingdom Agreement about the destruction of chemical weapons reached in 2001, which was set to expire no later than 31 March 2004.²³ Such expiration affects both Russia and United Kingdom.

By way of contrast, **'sectional' classifies those sunset clauses, which prescribe the expiration of one or some provisions only.** An example of sectional sunset clauses is recorded in the Treaty of Versailles signed on 28 June 1919 that ended the state of war between Germany and the Allied Powers. A number of provisions prescribing economic sanctions to Germany were subject to a five-year sunset clause.²⁴ Recently, in the Investment Agreement between Australia and Hong Kong, Article 40 includes a sectional sunset clause, which is referred only to a part of the Agreement.²⁵

Moreover, a sectional sunset clause in international treaties may prescribe different expiration dates for different Parties. Especially in multilateral treaties, it is possible that there are different expiration dates. This is very common in investment agreements. While most investment agreements are bilateral treaties, as Roberts has accurately put it, such agreements should be re-conceptualized as

²² Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.T.S. 140 Article 97.

²³ Agreement between the Government of the Russian Federation and the United Kingdom of Great Britain and Northern Ireland on Provision of Assistance for the Implementation of the Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction in the Russian Federation, (20 December 2001) Article 11

²⁴ The Treaty of Versailles, 28 June 1919, Article 68, Article 268, Article 280.

²⁵ Australia - Hong Kong Investment Agreement (2019) Article 40.1 '...In respect of covered investments made before the date on which the termination of this Agreement becomes effective (date of termination), Article 1 through Article 37 inclusive and Annexes I through IV inclusive shall continue to be effective for a further period of 10 years from the date of termination.'

'triangular treaties' because they are agreed between sovereign states but they also create enforceable rights for third-party beneficiaries, the investors.²⁶

As it will be seen below with more detail, most bilateral investment agreements include two sunset clauses, which are sectional. The primary sunset clause with a short duration prescribes the expiration of the provisions of the agreement for the Contracting Parties (and for future investors), and the secondary sunset clause with a longer duration prescribes the expiration of the provisions of the agreement for investments already made.

Consequently, **sectional sunset clauses may have a more complex construction prescribing different expiration dates for different provisions of the treaty and/or for different legal subjects.**

2.2. Direct and indirect

The second classification of the sunset clause is also defined by the scope of the provision. **A sunset clause is direct when it prescribes the termination of the whole or part of the embodied treaty.** For instance, the 50-year sunset clause in the ECSC regulates the duration of the aforementioned treaty.

²⁷

On the other hand, **an indirect sunset clause is incorporated in a treaty but it regulates the duration of another legal instrument.** Interestingly, indirect sunset clauses in international instruments are not very frequent.²⁸ However, the Vienna Convention on the Law of Treaties contains an indirect sunset clause. In particular Article 56, paragraph 2, which regulates the denunciation or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal states that: 'a party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty'.²⁹ Accordingly, the withdrawal from a treaty is subject to a one-year sunset clause, unless the drafters of the treaty have decided differently.

Another example of an indirect sunset clause is recorded in the recently reached international agreement between the E3/EU+3 and the Islamic Republic of Iran on Iran's nuclear energy program (the Joint Comprehensive Plan of Action (JCPOA), also known as 'Iran deal'). Article 20 includes an eight-

²⁶ Anthea Roberts, 'Triangular treaties: the nature and limits of investment treaty rights' (2015) 56 *Harvard International Law Journal* 353, 353-4. Multiple investment tribunals have recognized such triangular nature of IIA. See for instance, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Decision on Jurisdiction (1 October 2007) [153]; '[t]he objective purpose of such treaty provisions, which confer independent third party rights on investors'; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 (31 October 2011) [551] 'claimants' rights under the BIT, the breach of which is the cause of action in these proceedings'; cf the tribunal in *Loewen v USA* holding that 'claimants are permitted for convenience to enforce what are in origin the rights of Party states', *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3 (26 June 2003) [233]; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5 (21 November 2007) [171].

²⁷ Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.T.S. 140 Article 97.

²⁸ For indirect sunset clauses in constitutional documents, see Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses* (Routledge 2017) 11.

²⁹ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 56, paragraph 2.

year sunset clause, which defines the duration of 'all EU Regulation implementing all EU proliferation-related sanctions, including related designations'.³⁰

2.3. Conditional and unconditional

The third classification of sunset clauses is based on the expiration date. **When the expiration date is certain and does not depend upon any condition, then the sunset clause is unconditional.** An example of an unconditional sunset clause could be seen in the Treaty between USA and Russia on the Limitation of Strategic Offensive Arms, also known as SALT II at Vienna on June 18, 1979. In particular, Article 19 paragraph 1 provided that 'This Treaty shall be subject to ratification in accordance with the constitutional procedures of each Party. This Treaty shall enter into force on the day of the exchange of instruments of ratification and shall remain in force through December 31, 1985, unless replaced earlier by an agreement further limiting strategic offensive arms.'³¹

On the other hand, **a sunset clause is conditional when the automatic expiration of the law depends upon a future condition.** The condition may be relevant to the activation of the sunset clause, or it may be relevant to the expiration of a monumental event, the end of a war for instance. This is so notwithstanding that **conditional sunset clauses raise several interpretive issues and uncertainty regarding the exact expiration date.**³²

2.3.1. Expiration date based on a condition

An example of a conditional sunset clause is recorded in the Trade Agreement between the European Union and Colombia and Peru. Article 331 prescribes that the treaty would automatically expire for every contracting party if the EU withdraws. Accordingly, the expiration date of the Trade Agreement

³⁰ See Joint Comprehensive Plan of Action, 14 July 2015, Article 20. For more details see: Information Note on EU sanctions to be lifted under the Joint Comprehensive Plan of Action (JCPOA) [2.1]. Available at http://eeas.europa.eu/top_stories/pdf/iran_implementation/information_note_eu_sanctions_jcpoa_en.pdf. Accessed 1 August 2021 (last date accessed August 25 2021). Another example of indirect sunset clause is recorded in the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong. In particular, the declaration, which is a legally binding treaty, registered with the United Nations, regulates the Hong Kong's return to China. On 19 December 1984 the Government of the UK and the Government of the People's Republic of China signed the Sino-British Joint Declaration on the Question of Hong Kong and in article 3, the Government of the People's Republic of China declared that a number of agreed policies regarding Hong Kong such as the one country, two systems 'will be stipulated, in a Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, by the National People's Congress of the People's Republic of China, and they will remain unchanged for 50 years.' See at <https://www.cmab.gov.hk/en/issues/jd2.htm> (last date visited 31 August 2021). Consequently, the Sino-British Joint Declaration includes a 50-year sunset clause, which scope is the Basic Law of Hong Kong. Accordingly the Basic Law of Hong Kong, Special Administrative Region, in article 5 provides that 'The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years.' Basic Law of Hong Kong Special Administrative Region of the People's Republic of China, Article 5.

³¹ Treaty between The United States of America and The Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (SALT II) 18 June 1979, Article 19, paragraph 1. For more unconditional sunset clauses see also International Agreement on Olive Oil and Table Olives, 1 July 1986, Article 60.

³² For more details, see Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses* (Routledge 2017) 11.

between the European Union, Colombia and Peru is not certain. Generally, the condition that will automatically lead to the expiration of the Trade Agreement *erga omnes*³³ is the withdrawal of the EU.

Another example of a conditional sunset clause, which is common in multilateral treaties, is recorded in the Customs Convention on the international transport of goods under cover of TIR carnets. In particular, Article 55 prescribes that 'If, after the entry into force of this Convention, the number of States which are Contracting Parties is for any period of 12 consecutive months, reduced to less than five, the Convention shall cease to have effect from the end of the 12 month period.'³⁴ Accordingly, the convention expires automatically with the reduction of the Contracting Parties to less than five.

Another conditional sunset clause is recorded in the Agreement between the Government of Australia and the European Atomic Energy Community (Euratom). In particular Article 18 paragraph 3 regulating the entry into force and duration of the treaty³⁵ prescribes that the number of provisions will remain in effect notwithstanding the termination of the agreement so long as any nuclear material, non-nuclear material or equipment subject to these articles remains in the territory of the other Party.

More complex construction of a conditional sunset clause is recorded in the Agreement on the privileges and immunities of the ITER (International Fusion Energy Organization) for the Joint Implementation of the ITER Project. The sunset clause provides that 'this Agreement shall have the same duration as the ITER Agreement.'³⁶ In practice, the expiration of the Agreement depends on the expiration of another international instrument. In particular the Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project. The duration of the latter is defined in Article 24.³⁷

That said, the level of complexity of the conditional sunset clause and therefore the level of uncertainty about the expiration is increased when the expiration depends on the condition of a future agreement. To exemplify this case, the Agreement for cooperation in the peaceful uses of nuclear energy between the European Atomic Energy Community and the United States of America in Article 14 prescribes that once a party expresses its intent to terminate the agreement the six-month sunset clause is activated.³⁸ However, paragraph 4 requires that a joint meeting of the Parties shall decide whether further rights

³³ See Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part, OJ L 354, 21.12.2012, p. 3–2607, Article 331 paragraph 3. 'Notwithstanding paragraph 2, when a signatory Andean Country withdraws from this Agreement, this Agreement shall continue to be in force between the EU Party and the other signatory Andean Countries. This Agreement shall be terminated in case of withdrawal by the EU Party.' Similar construction is recorded in the ASEAN - Hong Kong, China Free Trade Agreement. See ASEAN - Hong Kong, China Free Trade Agreement Article 28 paragraph 4 and 5. Article 28 paragraph 5 provides that 'The ASEAN - Hong Kong, China Free Trade Agreement shall automatically terminate upon the termination of this Agreement pursuant to paragraph 4' and paragraph 4 of the same article provides that 'This Agreement shall terminate if, pursuant to paragraph 1: (a) the Hong Kong Special Administrative Region withdraws; or (b) this Agreement is in force for less than four ASEAN Member States.'

³⁴ Customs Convention on the international transport of goods under cover of TIR carnets (TIR Convention) OJ L 252, 14/09/1978 P. 0002 – 0065 Article 55.

³⁵ Agreement between the Government of Australia and the European Atomic Energy Community (Euratom) for cooperation in the peaceful uses of nuclear energy OJ L 29, 1.2.2012, p. 4–12 Article 18 paragraph 3.

³⁶ Agreement on the privileges and immunities of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project OJ L 358, 16/12/2006 p. 0082 – 0086, Article 27.

³⁷ Agreement on the Establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER Project OJ L 358, 16/12/2006 P. 0062 – 0080, Article 24.

³⁸ Agreement for cooperation in the peaceful uses of nuclear energy between the European Atomic Energy Community and the United States of America - Agreed Minute - Declaration on non-proliferation policy, OJ L 120, 20/05/1996 P. 0001 – 0036, Article 14 paragraph 2.

and obligations arising out of this Agreement shall continue in effect, and in case the Parties are unable to reach a joint decision pursuant to paragraph 4, an arbitral tribunal will deliver the solution.³⁹

2.3.2. Activation of the sunset clause based on a condition

In the field of international law conditional sunset clauses, which activation depends on a condition is very common for the following reason. Given that the commencement of international treaties depends upon a condition, such as the ratification,⁴⁰ sunset clauses are set to expire after a certain period of time, which depends on the commencement date. Thus, the expiration date of the sunset clause is not fixed explicitly, but is instead dependent upon the commencement date.

To put it differently, when a treaty with an uncertain commencement day contains a sunset clause, then it is inevitable for the Parties of the treaty to define the expiration date implicitly in combination with the commencement of the treaty. For instance, the 1951 European Community of Steel and Coal in Article 97 included a sunset clause prescribing that 'This Treaty is concluded for a period of fifty years from its entry into force.'⁴¹ The European Community of Steel and Coal was concluded for a period of fifty years and, having entered into force on 23 July 1952, expired on 23 July 2002. Conditional sunset clauses with uncertain activation dates are very common in investment treaties as the count down for the automatic expiration of the treaty depends on the notification of withdrawal.⁴²

2.4. Concluding remarks on the construction of the sunset clause

The construction of the clause sets the typology of sunset clauses and the following classification emerges: the 'entire' and the 'sectional' sunset clause, the 'direct' sunset clause compared to the 'indirect', and the 'conditional' or 'unconditional' sunset clause.

The drafters of the sunset clauses can attach such clauses to the whole or parts of the treaty, for certain legal subjects or *erga omnes*, they can set a specific expiration date, or they can define the expiration in a descriptive way defining its termination based on a condition. The reason why a treaty might contain for instance either a direct or an indirect sunset clause depends on the nature of the agreement and its surrounding circumstances.

It is readily apparent from the typology of sunset clauses that they are a flexible legal mechanism that can fulfill a variety of public policy purposes. The two major variables are the scope of the clause and the expiration date. It is noteworthy that even though the above categories are clearly defined, they are not mutually exclusive. The drafters of the treaties may combine different components, and hence a direct sunset clause can be at the same time conditional and sectional and similarly an indirect sunset clause can be conditional and entire.

³⁹ Agreement for cooperation in the peaceful uses of nuclear energy between the European Atomic Energy Community and the United States of America - Agreed Minute - Declaration on non-proliferation policy, OJ L 120 , 20/05/1996 P. 0001 – 0036, Article 14 paragraph 5 (b).

⁴⁰ About the commencement of treaties see Article 11 of the VCLT entitled 'Means of expressing consent to be bound by a treaty' which provides that 'The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.'

⁴¹ Treaty Establishing the European Coal and Steel Community, 18 April 1951, 261 U.N.T.S. 140 Article 97.

⁴² For more details see below Part 2.3.

However, conditional sunset clauses may cause interpretation problems, as the fulfillment of the condition may be disputed on different grounds. For instance, Parties may disagree on whether the entire condition was met.

3. SUNSET CLAUSES IN INTERNATIONAL AGREEMENTS; BENEFITS AND CHALLENGES

3.1. Sunset clauses in multilateral and bilateral treaties

In the field of international law, the use and utility of sunset clauses have remained largely unnoticed despite the fact that they have frequently been employed in major international treaties and agreements. Peace treaties, disarmament treaties, agreements regulating controversies, investment treaties and trade treaties are fully or partially subject to a sunset clause.

To begin with, the Peace Treaty of Versailles signed on 28 June 1919 between Germany and the Allied Powers is an example with sunset clauses. This treaty, which marked an important incident, the end of World War I, included a number of sanctions and obligations imposed upon Germany, interestingly subject to 5-year sunset clauses.⁴³

Moreover, another important Treaty, the Montreux Convention is subject to a two-year sunset clause.⁴⁴ Such treaty regulated the status of the straits in Bosphorus and Dardanelles straits, an issue, which has been a source of controversy over the years about Russia's access to the Mediterranean Sea.

In addition, a series of significant arms control treaties regulating the reduction of the nuclear weapons between USA and Soviet Union/ Russia were subject to sunset clauses. Suffice to mention here the Strategic Arms Reduction Treaty I (START I) signed on 31 July 1991 between the USA and Soviet Union which was subject to a fifteen-year sunset clause.⁴⁵ This Treaty expired on 5 December 2009. Likewise, the treaty that replaced Start I, the New Start Treaty signed on 8 April 2010 also includes a ten-year sunset clause.⁴⁶

Finally, regarding trade, before the development of the GATT system, sunset clauses were used to limit the duration of tariffs. To exemplify this with an early example, in 1838 United Kingdom and the Ottoman Empire signed the Convention of Commerce, the so-called Balta Liman. This agreement made some tariffs subject to a 14- year sunset clause.⁴⁷ Recently, sunset clauses were also included in major multilateral trade agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) which is a free trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam,⁴⁸ and replaced the Trans-

⁴³ Treaty of Versailles, 28 June 1919, Article 280

⁴⁴ Montreux Convention Regarding the Regime of the Straits, 20 July 1936, Article 28, paragraph 3: 'If, two years prior to the expiry of the said period of twenty years, no High Contracting Party shall have given notice of denunciation to the French Government the present Convention shall continue in force until two years after such notice shall have been given. Any such notice shall be communicated by the French Government to the High Contracting Parties.'

⁴⁵ Strategic Arms Reduction Treaty I, 31 July 1991, Article 17 paragraph 2: 'This Treaty shall remain in force for 15 years unless superseded earlier by a subsequent agreement on the reduction and limitation of strategic offensive arms. No later than one year before the expiration of the 15-year period, the Parties shall meet to consider whether this Treaty will be extended. If the Parties so decide, this Treaty will be extended for a period of five years unless it is superseded before the expiration of that period by a subsequent agreement on the reduction and limitation of strategic offensive arms. This Treaty shall be extended for successive five-year periods, if the Parties so decide, in accordance with the procedures governing the initial extension, and it shall remain in force for each agreed five-year period of extension unless it is superseded by a subsequent agreement on the reduction and limitation of strategic offensive arms.'

⁴⁶ See New Strategic Arms Reductions Treaty, 8 April 2010, Article 14 paragraph 2.

⁴⁷ Treaty of Balta Limani, 1838, Article 7.

⁴⁸ See Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018, Article 4 paragraph 2.

Pacific Partnership Agreement.⁴⁹ In like manner, the Canada – EU Comprehensive Economic and Trade Agreement (CETA), a recently reached trade agreement includes a three-year sunset clause in relation to investments made.⁵⁰

That said, regardless of the subject matter of the treaty, sunset clauses are attached in most bilateral treaties in relation to the denunciation and in most multilateral treaties in the withdrawal process. Take for example the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities, in which Euratom prescribes that once a party denounces the Convention by written notification to the depositary the 180-day sunset clause is activated before the automatic expiration.⁵¹ Interestingly, in most bilateral agreements in which the EU is a Party, the sunset clause is of six months.⁵²

3.2. Sunset clauses in investment treaties

Sunset clauses are a core feature in Interstate Investment Agreements (IIAs) and have played an underappreciated role. To begin, Model Bilateral Investment Treaties (BIT), which are the state's blueprint for their investment strategy, recommend their use and draft multilateral conventions for the protection of investments include sunset clauses. In particular, all Model BIT drafted by States and published at United Nations Conference on Trade and Development Investment Policy Hub include

⁴⁹ See Trans-Pacific Partnership Agreement, 4 February 2016, Article 30.6 paragraph 2.

⁵⁰ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11, 14.1.2017, p. 23–1079, Article 30.8 paragraph 2 'Notwithstanding paragraph 1, a claim may be submitted under an agreement listed in Annex 30-A in accordance with the rules and procedures established in the agreement if: [...] (b) no more than three years have elapsed since the date of termination of the agreement.'

⁵¹ Convention on the Physical Protection of Nuclear Material and Nuclear Facilities OJ L 034, 08/02/2008 P. 0005 – 0018, Article 21 paragraph 2. 'Denunciation shall take effect 180 days following the date on which notification is received by the depositary'. In like manner see Agreement for cooperation between the European Atomic Energy Community represented by the Commission of the European Communities and the Department of Energy of the United States of America in the field of fusion energy research and development, OJ L 148, 01/06/2001 P. 0080 – 0085, Article 11 paragraph 4. 'This Agreement and any Project Agreement hereunder may be terminated at any time at the discretion of either Party upon six months' advance notification in writing by the Party seeking to terminate the Agreement or Project Agreement.'

⁵² see Agreement for cooperation between the European Atomic Energy Community represented by the Commission of the European Communities and the Department of Energy of the United States of America in the field of fusion energy research and development, OJ L 148, 01/06/2001 P. 0080 – 0085, Article 11 paragraph 4. 'This Agreement and any Project Agreement hereunder may be terminated at any time at the discretion of either Party upon six months' advance notification in writing by the Party seeking to terminate the Agreement or Project Agreement.' See also Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, OJ L 23, 26.1.2018, p. 4–466, Article 385 paragraph 9; Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part, OJ L 29, 4.2.2016, p. 3–150, Article 281 paragraph 9; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261, 30.8.2014, p. 4–743, Article 431 paragraph 7; Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, OJ L 204, 31.7.2012, p. 20–130, Article 116 paragraph 2. However, the Agreement Establishing the European Economic Area (EC-EFTA) has a 12 month sunset clause. See European Economic Area - Final Act - Joint Declarations - Declarations by the Governments of the Member States of the Community and the EFTA States - Arrangements - Agreed Minutes - Declarations by one or several of the Contracting Parties of the Agreement on the European Economic Area, OJ L 1, 3.1.1994, p. 3–522, Article 127.

sunset clauses.⁵³ *Eo ipso*, concluded Bilateral Investment Treaties include such clauses.⁵⁴ Sunset clauses are recorded in most cases to regulate two occasions. First, the duration of the treaty between the Signatory Parties, and second, the duration of some or all effects of the treaty beyond the termination.

To exemplify this, the recent BIT between the EU and Singapore, which was reached in 2019, includes two sectional sunset clauses. The first is a six-month sunset clause, which is activated once one of the Parties notify in writing the other party of its intention to terminate this Agreement.⁵⁵ Then a second sectional sunset clause, with a 20-year duration, extends the force of the agreement for investments already made.⁵⁶ In particular Article 4.17 prescribes that 'In the event that this Agreement is terminated pursuant to Article 4.16 (Duration), this Agreement shall continue to be effective for a further period of twenty years from that date in respect of covered investments made before the date of termination of the present Agreement. This article shall not apply in the case of the termination of provisional application of this Agreement and this Agreement does not enter into force.'⁵⁷

While initiatives to form multilateral investment treaties have not received widespread support from national governments,⁵⁸ sunset clauses are included in several drafts. Remarkably, the Draft Convention on the Protection of Private Property, an early OECD initiative includes a 15-year sunset clause.⁵⁹ Likewise, the most recent initiative from the OECD, the Multilateral Agreement on Investment (MAI) includes a 15-year sunset clause in its final provisions.⁶⁰

But sunset clauses are an almost universal feature in bilateral investment treaties. An OECD working paper on international investment reported that 'the vast majority of investment treaties (97% of the sample of 2,061 treaties) have clauses that extend some or all effects of the treaty beyond

⁵³ See Model Agreements available at <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements> (last date visited 31 August 2021).

⁵⁴ Interestingly, the combination of a one-year sunset clause for the termination of the treaty in combination with a ten-year sunset clauses for its extension to already made investments is very common across the world. See for instance a BIT between Colombia and United Arab Emirates. The Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of United Arab Emirates. Article 26 entitled 'Final Provisions' provides: '3. This Agreement shall remain in force for a ten (10) year period and shall be extended indefinitely thereafter. This Agreement may be denounced at any time by any of the Contracting Parties, by serving a twelve (12) month prior notice, sent through diplomatic channels. 4. With respect to investments admitted before the date on which the notice of termination of this Agreement becomes effective, the provisions of this Agreement shall remain in force for an additional term of ten (10) years from such a date.'

⁵⁵ Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore of the other part (19 October 2018) Article 4.16 paragraph 3 'This Agreement shall be terminated six months after the notification under paragraph 2 without prejudice to Article 4.17 (Termination).'

⁵⁶ The combination of two sectional sunset clauses is very common in BITs. See also the more recent Canada Model BIT 2021 available at <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements> (last date accessed 31 August 2021). Article 57 paragraph 4 provides that '(...) The termination of this Agreement will be effective one year after the written notice of termination has been received by the other Party. In respect of investments or commitments to invest made prior to the date of termination of this Agreement, Articles 1 through 56, as well as paragraphs 1 and 2 of this Article, shall remain in force for 15 years.'

⁵⁷ Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore of the other part (19 October 2018) Article 4.17.

⁵⁸ For more details on Multilateral Investment Treaties, see Glen Kelley, 'Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations' (2001) 39 Columbia Journal Transnational Law 483.

⁵⁹ OECD, Draft Convention on the Protection of Private Property, 16 October 1967, C(67)102, Article 13 available at <https://www.international-arbitration-attorney.com/wp-content/uploads/137-volume-5.pdf> (last date accessed 31 August 2021).

⁶⁰ OECD, Multilateral Agreement on Investment [XII. Final Provisions, Withdrawal] available at <https://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> (last date accessed 31 August 2021).

termination by a fixed period during which treaty protections still hold for investments that have been made – or approved or committed – prior to termination of the treaty. The shortest fixed survival period in the sample is 5 years and the longest is 25 years.⁶¹

Sunset clauses are not only a universal feature of the current bilateral investment treaties, they are also a diachronic feature; even the first bilateral investment treaty agreed between Germany and Pakistan in 1959⁶² included two sunset clauses. The former in Article 14 paragraph 2 is a one-year sunset clause activated once either signatory party submits the notice for termination.⁶³ The latter is a ten-year sunset clause activated once the treaty has expired and it extends the treaty provisions for ten years to the already made investments.⁶⁴

While it seems that sunset clauses are a permanent feature of investment treaties, - such clauses recently attracted the interest of practitioners and academics alike for a number of reasons.

First, certain States denounced their BITs, for instance Indonesia⁶⁵ and South Africa⁶⁶ unilaterally terminated a number of BITs, and most, if not all of these BITs, contained sunset clauses.

Second, some countries denounced the 1965 Washington Convention (the 'ICSID Convention'), which regulates the conciliation and arbitration of investment disputes between state parties to the Convention and nationals of other contracting states.⁶⁷ Bolivia was the first country that withdrew from

⁶¹ See Kathryn Gordon and Joachim Pohl, *Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World*, OECD Working Papers on International Investment 19 (OECD Publishing) 19.

⁶² See Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (entered into force 28 November 1962).

⁶³ Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (entered into force 28 November 1962). Article 14, paragraph 2 provides that '(...) After the expiry of the period of ten years, the present Treaty may be terminated at any time by either Party giving one year's notice.'

⁶⁴ Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959, 457 U.N.T.S. 24 (entered into force 28 November 1962). Article 14, paragraph 3 provides 'In respect of investments made prior to the date of expiry of the present Treaty, the provisions of Articles 1 to 13 shall continue to be effective for a further period of ten years from the date of expiry of the present Treaty.'

⁶⁵ 'Indonesia indicates intention to terminate all of its Bilateral Investment Treaties?' (20 March, 2014) <https://hsfnotes.com/arbitration/2014/03/20/indonesia-indicates-intention-to-terminate-all-of-its-bilateral-investment-treaties/> (last date accessed August 25 2021).

⁶⁶ see Tania Voon and Andrew D. Mitchell, 'Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law' (2006) 31 *ISCID Review* 413, 424.

⁶⁷ The ICSID Convention entered into force in 1966 and by 2006, 143 States have ratified the Convention. Key provisions in the ICSID Convention are articles 53 and 54, which regulate the recognition and enforcement of ICSID awards. In particular, article 53 provides that **'the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy** except those provided for in this Convention. [...]'

and article 54 provides that '[e]ach Contracting State shall recognize an award rendered pursuant to this Convention **as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.**' See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes [ICSID]) 575 UNTS 159, Article 53 and Article 54. In relation to ICSID awards, the orthodoxy is that decision for arbitral tribunals are not subject to review from national courts. See Christoph H. Schreuer, Loretta Malintoppi, August Reinisch, Anthony Sinclair, *The ICSID Convention: A Commentary* (CUP 2009) 1127. In practice, national courts have no discretion to review ICSID decisions, and if a national court reviews and denies the enforcement of an ICSID award, it is possible, in theory at least, the investor's host State to bring an action before the International Court of Justice for breach of the ICSID obligation. See Micula and others (Respondents/Cross-Appellants) v Romania (Appellant/Cross-Respondent) [2020] UKSC 5 (UK Supreme Court) [105]. Cf Case T-624/15, T-694/15 and T-704/15, *European Food SA and Others v Commission*, Judgment of 18 June 2019, ECLI:EU:T:2019:423.

the ICSID system in 2007,⁶⁸ while Venezuela and Ecuador soon followed,⁶⁹ with the latter re-signing the ICSID Convention on June 23, 2021. Naturally, these withdrawals gave rise to complex legal issues, which ended up being litigated before investment tribunals. One such example is the *E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia*, however, the proceedings of which were discontinued.⁷⁰

Finally, the Court of Justice of the European Union (CJEU) in *Achmea* gave its answer to a hotly-debated and fiercely-litigated (and arbitrated) question, namely the non-compatibility of intra-EU BITs with EU law,⁷¹ And recently the same Court ruled that Article 26 of the ECT, which provides for arbitration, is incompatible with EU law at intra EU level.⁷² However most of the intra EU BITs and the ECT are subject to sunset clauses,⁷³ and this complicates the unilateral withdrawal especially due to the entrenchment effect of such clauses.⁷⁴

3.3. Sunset Clauses in Energy Charter Treaty

The Energy Charter Treaty (ECT) signed in The Hague on 17 December 1991 and entered into force on 16 April 1998 is a unique multilateral treaty for the promotion of international cooperation in the energy sector.⁷⁵ Currently a plethora of States have signed the ECT including the EU, however Norway, Belarus, Russia and Australia have not ratified it.⁷⁶ Such treaty with its 50 articles regulates a variety of topics in commercial energy activities including investments and dispute resolution.

As it is stated in Article 2 of the ECT entitled 'purpose of the treaty', such a treaty aims to establish a legal framework 'in order to promote long-term cooperation in the energy field'.⁷⁷ In line with the above, an ICSID tribunal further refined the key values promoted by the ECT, which are long-term cooperation and stability. In particular, the tribunal held that 'the ECT's stated purpose thus emphasizes

⁶⁸ Chrispas Nyombi, and Tom Mortimer, 'Rights and Obligations in the Post Investment Treaty Denunciation Period' (2018) 21 International Arbitration Law Review 46. See also Emmanuel Gaillard, "The Denunciation of the ICSID Convention" (26 June 2007) New York Law Journal 1.

⁶⁹ Chrispas Nyombi, and Tom Mortimer, 'Rights and Obligations in the Post Investment Treaty Denunciation Period' (2018) 21 International Arbitration Law Review 46.

⁷⁰ See *E.T.I. Euro Telecom International N.V. v. Plurinational State of Bolivia* (ICSID Case No. ARB/07/28).

⁷¹ Case C-284/16, *Slowakische Republik v Achmea BV* Judgment of 6 March 2018 (ECLI:EU:C:2018:158). For more analysis on this case in relation to the conflict between EU Treaties and International Treaties see Part 5.2 and in relation to the role of the courts 'sunsetting' treaties subject to sunset clauses see Part 5.2 and 5.3.

⁷² Case C-741/19, *Republic of Moldova v Komstroy*, a company the successor in law to the company Energoaliants, Judgment of 2 September 2021 (ECLI:EU:C:2021:655).

⁷³ For more analysis about the impact of the *Achmea* decision and *Komstroy* decision in relation to sunset clause see below Part 5.3.

⁷⁴ On the entrenchment effect of sunset clauses see below Part 4.1.2.

⁷⁵ On the history of the ECT, see Rafael Leal-Arcas, *Commentary on the Energy Charter Treaty* (Edward Elgar 2018) 2ff.

⁷⁶ Afghanistan, Albania, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Union and Euratom, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Mongolia, Montenegro, The Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, Turkey, Turkmenistan, Ukraine, United Kingdom, Uzbekistan, Yemen.

⁷⁷ Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 2.

the treaty's role in providing a legal framework promoting long-term cooperation, suggesting that the treaty is conceived as enhancing the stability required for such cooperation.⁷⁸

In practice, the ECT in order to achieve long-lasting cooperation, like ordinary investment treaties, includes a five-year initial validity period, during which Signatory Parties cannot unilaterally terminate the treaty.⁷⁹ In addition, the exit from the treaty is subject to two sectional sunset clauses marking the complexity of the procedure. Pertaining to Parties to the ECT, a sectional sunset clause in Article 47, paragraph 2, in reality, extends the validity of the treaty for one year after the date of the receipt of the notification of the withdrawal.⁸⁰ Once the one-year period passes, the treaty automatically expires for the Contracting Parties and it does not extend protection for new investments.

Then, a second sectional sunset clause, in paragraph 3 of the same article, is referred only to investments already made, and extends the validity of the provisions of the ECT to such investments for 20 years from the date the withdrawal takes effect.⁸¹ According to the *Travaux Préparatoires* of the ECT, the initial draft did not include the 20-year sunset clause. The sunset clause was a suggestion by the United States and the EU (European Communities, at that time), which was supported by other delegations, and first recorded in the Basic Agreement 4.⁸²

Thus, according to the combination of both sunset clauses, the Parties to the treaty that unilaterally withdraw from the ECT shall comply with the provisions of the ECT for investments already made, for 21 years (*in toto*) from the date they notified their intention to withdraw. For instance, **countries, which withdraw from the ECT, must accord 'fair and equitable treatment', 'constant protection and security' and 'shall in no way impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment or disposal of an investment'**.⁸³ Remarkably, even for the provisional application of the ECT to signatories, in like manner, a sectional sunset clause extends for 20 years the validity of the provisions of the ECT for investments already made.⁸⁴

⁷⁸ Eiser Infrastructure Ltd and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain, ICSID Case No.ARB/13/36, Award, 4 May 2017 [378].

⁷⁹ Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 47, paragraph 1 'At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depositary of its withdrawal from the Treaty'.

⁸⁰ Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 47, paragraph 2 'Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depositary, or on such later date as may be specified in the notification of withdrawal.'

⁸¹ Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 47, paragraph 3 '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.'

⁸² Travaux Préparatoires of the Energy Charter Treaty, Basic Agreement 4 (31 October 1991) [Article 44].

⁸³ Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 10.

⁸⁴ Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 45(3)(b) 'In the event that a signatory terminates provisional application under subparagraph (a), the obligation of the signatory under paragraph (1) to apply Parts III [Investment Promotion and Protection] and V [Dispute Settlement] 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'

3.4. Rationale of Sunset Clauses in multilateral and bilateral treaties

3.4.1. Regulation of temporary and transitional issues

Since sunset clauses have been widely used in international agreements regulating a variety of topics, such as peace treaties, arms disarmament, trade and investment agreements, the key questions are the following: first why do drafters include sunset clauses, and second does the subject matter of the treaty spur the inclusion of such clauses?

To begin with, the use of such clauses has been motivated by a plethora of reasons. Treaty making is a complex process, encompassing bargaining and mutual concessions, which inevitably takes time to conclude. Such time is a resource invested from the treaty-making institutions, alternatively seen as the cost of the treaty-making. Once treaties are concluded, the participatory states expect the return over the lifespan of the treaty.

Given the resources spent on the conclusion of a treaty, temporary treaties, or treaties subject to sunset clauses are paradoxical. However, such a paradox is resolved because treaty-making has a complex connection with time due to the tradeoff between over-commitment and flexibility. On the one hand, the resources spent for the treaty conclusion demand commitment over time, on the other hand, flexibility is a necessary condition imposed *ratione materiae* or *ratione personae*.

Treaties might be temporary because they might regulate temporary matters or transitional situations. For instance, we have seen that at the end of World War I, the economic sanctions imposed on Germany were by default temporary, and thus subject to a five-year sunset clause.⁸⁵ Interestingly, the authors of the treaty had combined the sunset clause with a review clause⁸⁶ making it possible to extend such sanctions for a further period.

Moreover, in the 70s, while the USA and USSR were negotiating complex and time-consuming issues such as disarmament, they concluded an interim agreement subject to a five-year sunset clause.⁸⁷ Such agreement was made temporary until a more comprehensive agreement was reached. According to the US Bureau of International Security and Nonproliferation, the interim agreement was seen 'as a holding action, designed to complement the [1972 Anti-Ballistic Missile] ABM Treaty by limiting competition in offensive strategic arms and to provide time for further negotiations'.⁸⁸

⁸⁵ Treaty of Versailles, 28 June 1919, Article 280 'The obligations imposed on Germany by Chapter I and by Articles 271 and 272 of Chapter II above shall cease to have effect five years from the date of the coming into force of the present Treaty, unless otherwise provided in the text, or unless the Council of the League of Nations shall, at least twelve months before the expiration of that period, decide that these obligations shall be maintained for a further period with or without amendment.'

⁸⁶ For more details about 'review clauses' see below footnote 111.

⁸⁷ Interim Agreement Between the United States and the Union of Soviet Socialist Republics on Certain Measures With Respect to the Limitation of Offensive Arms (SALT I), May 26, 1972, Article 8 paragraph 2.

⁸⁸ See Bureau of International Security and Nonproliferation, available at <https://2009-2017.state.gov/t/isn/4795.htm>. However, not every interim agreement is subject to a sunset clause. For instance, the European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors is subject to a review clause. See European Interim Agreement on Social Security Schemes relating to Old Age, Invalidity and Survivors 11 July 1953, Article 16. This Agreement shall remain in force for a period of two years from the date of its entry into force in accordance with paragraph 2 of Article 13. Thereafter it shall remain in force from year to year for such Contracting Parties as have not denounced it by a notification to that effect addressed to the Secretary General of the Council of Europe at least six months before the expiry either of the preliminary two-year period, or of any subsequent yearly period.'

In like manner, the Interim Agreement reached by the Government of the State of Israel and the Palestine Liberation Organization on the West Bank and the Gaza Strip, also known as 'Oslo II' was subject to a five-year sunset clause.⁸⁹ Such agreement was aiming to set a transitional period in the peace process before reaching a final agreement between the two conflicting parties.

On the other hand, transitory issues are, for instance, the withdrawal from a treaty. States in most treaties have the power to withdraw unilaterally; however, the withdrawal is subject to conditions.⁹⁰ For instance, a transitory period between the notification of withdrawal and the treaty's cessation to the withdrawing State is required. Such a period between the notification and the actual withdrawal is actually the common ground necessary to bridge the gap between two key principles of international law: the strict application of *pacta sunt servanda* and the unconstrained state sovereignty.⁹¹

Sunset clauses are also highly desirable in policy areas that require more flexibility. In particular, the prospect of the expiration allows the Parties of a treaty to update or to tailor the treaty provisions to short-term or long-term goals. De facto sunset clauses in treaties create a scheduled opportunity for the policy-makers to review the progress and the implementation of the treaties.

In theory, the use of sunset clauses offers a number of benefits. In particular, **such clauses are useful to regulate complex issues, where there is a difficulty to reach a consensus.** A sunset clause limiting the duration of a treaty might create the necessary common ground, which is required for an agreement. Furthermore, in a period where the law's ability to keep up pace with technological changes is questioned, such clauses might by making room for experimentation and innovation. Finally, sunset clauses also are highly desirable in policy areas that require stability and legal certainty, especially in relation to investment issues.

3.4.2. Safeguarding sovereignty

The idea of state sovereignty is in theory a pure unconstrained supreme power;⁹² in practice though it is subject to constraints, preemptory or consensual. In the international system two types of norms exist *jus dispositivum* (ordinary norms) which the states agree with and thus have the power to depart from and *jus cogens*, which are preemptory norms, a set of rules and values that states shall uphold, without the power to derogate from them.⁹³

Sovereign states with *jus dispositivum*, voluntarily limit themselves. For instance, this is the case of international treaties when various states enter into contractual agreements (treaties) with other states. Once states sign and ratify a treaty, then these states must abide by the treaty provisions. *Pacta sunt servanda*, which means 'agreements are to be kept' is a fundamental principle in international law

⁸⁹ Interim Agreement on the West Bank and the Gaza Strip (Oslo II) September 28, 1995 [Preamble]/

⁹⁰ See for instance Treaty on European Union (Consolidated version 2016) OJ C 202, 7.6.2016, Article 50, paragraph 3.

⁹¹ See Thomas Giegerich, 'Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 968.

⁹² The etymological origin of sovereignty derives from the latin verb *superamus* (surmount, overtop, overcome). See Hans Kelsen, 'Sovereignty and International Law' (1960) 48 *Georgetown Law Journal* 627; On state sovereignty, see also Nico Schrijver, 'The Changing Nature of State Sovereignty' (1999) 70 *British Yearbook of International Law* 65.

⁹³ *Jus cogens* is regulated by the VCLT. See United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 53 and Article 64. On the issue of *jus cogens* see Dire Tladi, 'First report on *jus cogens* by the ILC Special Rapporteur' (8 March 2016) A/CN.4/693; Alexander Orakhelashvili, *Preemptory Norms in International Law* (OUP 2006). About the historical development of *jus cogens* see Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (CUP 2015).

regulating the relations between stakeholders in international relations. This principle is enshrined in Article 26 VCLT providing that '[e]very treaty in force is binding upon the Parties to it and must be performed by them in good faith.'⁹⁴

A fortiori, any restriction shall be based on the state's consensus to limit its sovereignty. As states are bound by treaties, any perpetual treaty is a permanent restriction deemed incompatible with the interest of the sovereign. Thus the States, as the ones holding the treaty-making power and the sovereign power, are not willing to limit state sovereignty indefinitely.

Within this context, **treaties subject to sunset clauses are useful in limiting the effect of treaties on sovereign power**. At the automatic expiration of the treaty, the limitation would be removed and thus the state would retain its sovereign powers. In other words, the inclusion of a sunset clause is not determined by the subject matter of the treaty, but it is based on the interests of the Parties in the treaty (*ratione personae*). Suffice to mention here the comparison between the survival clause in the ICSID Convention and the sunset clause in the ECT. If a contracting state withdraws from the ICSID Convention, according to the survival clause of Article 72 of the same convention, a state's consent to ICSID arbitration based on BITs may remain in effect for an indefinite period despite its withdrawal after it ceased to be an ICSID contracting party. However, if a contracting state withdraws from the ECT, according to the sunset clause of Article 47 paragraph 3 the state's consent to arbitration based on the ECT remains in effect only for 20 years.

Moreover, whereas consensus among different Parties is an important element in the decision-making process, for instance, in rulemaking, such clauses may be of paramount utility to circumvent disagreement and gridlocks. Since sunset clauses are a useful bargaining tool in order to create consensus, their use could not find a better environment to operate than that of international law, not least because the latter is characterised by a polycentric system of power.

To exemplify this, when on 9 May 1950 then French foreign minister Robert Schuman presented the so-called Schuman Declaration and proposed the creation of a European Coal and Steel Community, the groundbreaking from the perspective of law was the supranational character of the institutions of such organization. In particular, the innovation was the extent of power and the autonomy of the High Authority of the European Coal and Steel Community which *e contrario* implied a limit on the sovereignty of the Members States.

Accordingly, 'The delegates from the three Benelux countries demanded a treaty that clearly spelled out the technical powers to be entrusted – for a fixed period – to the High Authority, as some of them feared that it would interfere in sensitive national areas.'⁹⁵ In line with the above, disarmament and investment treaties are also examples of treaties often subject to sunset clauses due to sovereignty concerns. Concerning disarmament treaties, such international agreements attach obligations to the state sovereignty to reduce their military forces and weapon arsenals.⁹⁶ Such constraints, especially in defense are always subject to special focus. Suffice here to mention the congressional debate on the Nuclear Test Ban Treaty.⁹⁷ This treaty was signed in 1963 by the Soviet Union, the United Kingdom, and

⁹⁴ See United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 26.

⁹⁵ See Negotiations on the ECSC Treaty, available at <https://www.cvce.eu/en/recherche/unit-content/-/unit/5cc6b004-33b7-4e44-b6db-f5f9e6c01023/4d82341b-4d28-4cb5-95d9-41b3c630bdc1> (last date accessed 31 August 2021).

⁹⁶ See Adrian S Fisher, 'Arms Control and Disarmament in International Law' (1964) 50 Virginia Law Review 1200.

⁹⁷ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (5 August 1963).

the United States and its aim is to control atomic power and contribute to the slowing down of nuclear weapon proliferation.

While Congress discussed this treaty, the 90-day sunset clause attached to the withdrawal⁹⁸ attracted the interest of the congressional representatives who wondered whether the United States would have to comply with the sunset clause if the Soviet Union for instance violated the Treaty and conducted nuclear tests.⁹⁹ That said, it is probable that the sovereign right to terminate a treaty regulating a sensitive topic concerning disarmament explains the short sunset clause attached to the withdrawal.

Concerning investment treaties, it is sufficient to mention the tradeoff between credibility and sovereignty. Indeed, when states sign investment agreements, they trade credibility for sovereignty.¹⁰⁰

Their sovereign right to enact new policies or to change existing ones is restricted. In other words their regulatory conduct is restricted. On top of that, the adherence to the investment agreement terms is subject to control through a compulsory international alternative dispute resolution system. Within this framework, sunset clauses in investment agreements fuse the framework with the necessary required when the Parties in the treaty have conflicting interests. Flexibility is enshrined in the investment treaties especially in their special provisions about when they take effect, and for how long such effect remains in force.¹⁰¹

3.5. Rationale of Sunset Clauses in Investment Treaties

3.5.1. Legal protection to investors

International law regulates the relationships between states, and states with international organizations. Hence, international law was regarded as the domain of States and International Organizations, putting private actors such as investors aside.¹⁰² The traditional protection to foreign investors was based on the system of diplomatic protection.¹⁰³ In particular, an investor needed to persuade their home state to take action on their behalf in the case a host State's conduct had impaired the investment.¹⁰⁴

Nonetheless, the traditional system, also known as 'state centric', was not creating a fertile ground to spur investments. To bolster investments around the world, treaties regulating investments had to incorporate a special legal configuration ensuring that investors' rights enjoy a higher level of protection. In terms of procedure, this investor-State approach enshrined in the development of investor-State dispute settlement and the establishment of the *jus standi* of private actors.¹⁰⁵ The

⁹⁸ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (5 August 1963) Article 4.

⁹⁹ Hearings on the Nuclear Test Ban Treaty Before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess. (1963) 37, 41.

¹⁰⁰ See Anne van Aaken, *International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis* (2009) 12 *Journal of International Economic Law* 507, 509.

¹⁰¹ About the utility of sunset clauses in investment treaties see below Part 3.5.

¹⁰² For more details see Lassa Oppenheim, *International Law: A Treatise* (2nd edn, Longmans, Green & Co 1912) vol 1, 362–64 s 289.

¹⁰³ Muthucumaraswamy Sornarajah *The International Law on Foreign Investment* (CUP 2021 5th ed) 26ff.

¹⁰⁴ See *Mavrommatis Palestine Concessions* (Greece v United Kingdom) [1924] PCIJ Rep Series A, No 2, 12.

¹⁰⁵ Tania Voon, Andrew Mitchell, James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29 *ICSID Review* 451, 454.

investor–State dispute settlement allowed foreign investors whose home state was a contracting party to an investment treaty to bring a claim before an arbitral tribunal, if the host state of their investment, and contracting party to the same investment treaty violated the rights granted by that investment treaty. A vital precondition was for the states to waive their immunity.

In terms of substance, host states prioritized foreign investors' property rights in order to attract investments and were willing to constrain their policymaking, even in sensitive areas such as economic policies and exploitation of natural resources.¹⁰⁶

As a result, a rapid proliferation of investment treaties occurred regulating the terms under which nationals of one contracting state could invest in another country, the host state.¹⁰⁷ Since the first bilateral investment treaty between Pakistan and Germany signed in 1959, more than 2700 BITs were signed.¹⁰⁸ Such protection to investors was not confined exclusively in investment agreements. Investment protection provisions were also embedded in regional free trade agreements and in monothematic treaties such as the Energy Charter Treaty (ECT).¹⁰⁹

The plethora of investment treaties has resulted multiple, overlapping channels that investors can use - as long as their home state is signatory. According to the investment policy hub statistics, since 2014, 1104 investment arbitrations are registered in their public record, and from the 740 which are concluded, 212 were decided in favor of the investor, 274 in favour of the State, 16 were decided in favour of neither party (liability found but no damages awarded), 148 were settled and 90 were discontinued.¹¹⁰

Interestingly, as Peinhardt and Wellhausen remark in relation to the award won by foreign investors that '[h]alf of these awards are below US\$20 million. Five proceedings have resulted in awards of US\$1 billion or more.'¹¹¹

In accordance with the above, the inclusion of duration clauses, which guarantee at the beginning the minimum validity of an investment treaty, and **sunset clauses are a key apparatus guaranteeing certainty in the longevity of procedural and substantive protections**. An OECD study reports 'investment treaties tend, by design, to "lock in" treaty partners to their commitments in ways that give the treaty continuing effect for many years'.¹¹²

In most investment treaties two consecutive sunset clauses are included regulating the unilateral withdrawal. The first sunset clause is of short duration, in most of the cases a one-year sunset clause, and extends the duration of the treaty between the notification of withdrawal and the termination of

¹⁰⁶ For more details see Clint Peinhardt, Rachel L. Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment' (2016) 7 Global Policy 571.

¹⁰⁷ The nationality of the investors is a key precondition for the protection, however, investors can use company law in a creative way to structure investments through subsidiaries, and hence receive protection based on different nationalities, maximising treaty coverage. On this issue, see Kyla Tienhaara and Lorenzo Cotula, 'Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets' (IIED 2020) 26. See also Part 6.4.

¹⁰⁸ About the waves of BITs see Srividya Jandhyala, Witold J. Henisz and Edward D. Mansfield, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55 The Journal of Conflict Resolution. 1047

¹⁰⁹ About the ECT see above Part 3.3.

¹¹⁰ Investment Dispute Settlement Navigator, UNCTAD Investment Policy Hub, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>

¹¹¹ Clint Peinhardt, Rachel L. Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment' (2016) 7 Global Policy 571, 572.

¹¹² Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World' OECD Working Papers on International Investment 19 (OECD Publishing) 18.

the treaty. In reality, the first sunset clause is sectional, as the treaty provisions are set to expire only for the Parties and future investors.

The second sunset clause usually of longer duration, is also a sectional sunset clause extending the duration of the treaty provisions, namely in relation to the provisions with procedural and substantive protection specifically for the investments already made before the termination of the treaty.¹¹³ Actually, this is the objective purpose of the second sunset clauses in investment treaties: 'to confer independent third party rights on investors', as an investment tribunal has put it.¹¹⁴

Statistics from an OECD study show the practical implications of sunset clauses.¹¹⁵ In a random sample of 1,896 treaties active during 2014, if a party have unilaterally withdrawn from the treaty in 2014:

- More than 90 percent of these treaties would have their force extended protecting investors until at least 2025;
- More than 50 percent of these treaties would have their force extended protecting investors until at least 2030; and
- More than 25 percent of these treaties would have their force extended protecting investors until at least 2034.

In reality, sunset clauses create a temporal safe harbor, which guarantees that the termination of the treaty for the Parties, caused by unilateral withdrawal,¹¹⁶ will not affect their status. Overtime the inclusion of sunset clauses in investment agreement became a uniform practice.¹¹⁷

3.5.2. Legal certainty in the interplay between stability and flexibility

Investment treaties are designed with the promise to ensure that this system works for all stakeholders, namely the Signatory States and the investors. In essence, investment treaties contain a promise from the Contracting Parties to safeguard their investment from policy changes and provide investors with due process before an impartial tribunal. In nature, investment treaties are agreements between states that favor third parties, the investors.

The incorporation of sunset clauses into multilateral or bilateral investment agreements does not simply mark the minimum and the maximum duration of such agreements. Still most importantly, **their presence creates the necessary environment for legal certainty and reinforces the rule of law in the international arena.** Sunset clauses especially with a long duration reinforce stability and predictability by slowing down the process of treaty exit.

¹¹³ However, the scope of the sunset clause depends on the construction. For instance, an investment agreement between Canada and Peru covers investments made and commitments to invest prior to the date of the termination of the Agreement. See Agreement Between Canada and the Republic of Peru for the Promotion and Protection of Investments (14 November 2006) Article 52 Paragraph 3.

¹¹⁴ RosInvestCo UK Ltd. v. The Russian Federation, SCC Case No. 079/2005 [153].

¹¹⁵ Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World' OECD Working Papers on International Investment 19 (OECD Publishing) 20.

¹¹⁶ In most cases, sunset clauses are activated in case of a unilateral withdrawal from a BIT, while the mutual termination of a treaty does not activate them. More detailed discussion on this issue in Part 4.3.

¹¹⁷ For more analysis, see Above at Part 3.2

In principle, as it is accurately put, 'all systems of law – embody a permanent tension between stability and flexibility'.¹¹⁸ In contract law, for instance, the parties, on the one hand, draft contracts to bring predictability to the future to avoid uncertainty and risk. On the other hand, include provisions to adapt to unforeseen changes they cannot anticipate. In like manner, in investment treaties the problem between stability and flexibility is present.

Instability is not desirable from the investors' perspective as it has a deterrent effect on investment planning and action. Since investment treaties' philosophy is the protection of the investors, the rigidity of their provision is a necessary ingredient.

On the other hand, states, which commit to certain promises to future investors, **restrict the pallet of the policymaking and they waive their immunity for the sake of an alternative dispute resolution system**, first, do not want to waive their sovereign right to withdraw from a treaty, and second do make such concessions temporarily.¹¹⁹ An investment treaty of short duration gives more room for flexibility to policymaking and favors the host state.¹²⁰

Sunset clauses are a key mechanism to create a common ground between two antithetical interests: on the one hand the legal certainty for investors, on the other hand the sovereign right to withdraw from a treaty and unchain policymaking.

Once the host state expresses its intention to withdraw from an investment treaty unilaterally, the sunset clauses are activated. The countdown starts of a transitional period between investment protection and no protection. For such transitional period, investments already made are protected from the sudden unilateral termination of an investment treaty.

The duration safeguards in the investment treaties (such as the initial validity period and the sunset clause) permit investors to calculate the risk of time-limited protection and de-invest in their investment. Hence, sunset clauses offer legal certainty about the duration and the expiration of such protection. In other words, the specific expiration date of treaties makes the law predictable, and investors can plan accordingly and be guided.

In addition, it is worth mentioning that **between stability and flexibility, the duration of the sunset clause is critical. If the period is long, states value more peace and encourage more investments. On the other hand, if the term of the clause is short, it seems that states value more flexibility.**

¹¹⁸ See Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World' OECD Working Papers on International Investment 19 (OECD Publishing) 6.

¹¹⁹ There are a number of apparatus used in investment treaties to enhance flexibility such as escape clauses and explicit public policy exceptions. For more details, see Anne van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 Journal of International Economic Law 507, 522.

¹²⁰ See Anne van Aaken, 'International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis' (2009) 12 Journal of International Economic Law 507, 518.

4. LEGAL EFFECTS OF SUNSET CLAUSES IN INTERNATIONAL TREATIES AND THE IMPACT ON THE POWERS OF LEGISLATORS UNDER EU TREATIES

4.1. Legal Effect: temporary duration and entrenchment

4.1.1. Automatic expiration

The legal effect of sunset clauses is the automatic expiration of a law at national level, or of a treaty at an international level.¹²¹ The automatic expiration of sunset clauses has two major consequences concerning international treaties:

- first, unless the Parties of the treaty amend the provision with the sunset clause, for instance by extending the duration, the sunset clause automatically brings about the expiration of the treaty on the prescribed date, and
- second, if a provision in a treaty prescribes that such a treaty should expire for a specific date, then it is reasonable to assume that such a treaty is not binding unless reenacted.
- However, there might be exceptions in each instance.

Pertaining to the first consequence, we need to stress that **the legal effect of the expiration of a treaty caused by a sunset clause is not always equivalent to the legal effect of the termination by the Parties**. In relation to national law, Broom, first remarked that there is a difference between statutes, that expire and statutes that are repealed, since 'although the latter become as if they had never existed (except so far as they relate to transactions already completed under them), yet, with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction'.¹²²

To illustrate Broom's remark in relation to international law, suffice it to mention that according to Article 70 of the VCLT, treaties that are terminated by consent, stop producing legal effects ex nunc. Parties are released from any further obligation to perform the treaty' (saving the exception of any right, obligation or legal situation of the Parties created through the execution of the treaty prior to its termination').¹²³ However, with treaties that expire due to a sunset clause, it is possible to have a previous treaty regulating the same topic revived from its suspension.¹²⁴ Aust on this matter states that

¹²¹ In reality, the automatic expiration distinguishes the sunset clause from other duration clauses. For instance, a review clause is defined as the requirement for a law to be reviewed on a specific date or after the passage of a specific period of time. However, the law does not expire automatically. The lifespan and the content of the law depend on the review. To exemplify, the Canada EU Comprehensive Economic and Trade Agreement in Article 10.10 includes a review clause, which prescribes that 'Within five years following the entry into force of this Agreement, the Parties shall consider updating their respective commitments under Articles 10.7 through 10.9.' or another five year review clause is recorded in Article 29 of the Montreux Convention 'At the expiry of each period of five years from the date of the entry into force of the present Convention each of the High Contracting Parties shall be entitled to initiate a proposal for amending one or more of the provisions of the present Convention.' Both treaties won't expire after five year, however after the passage of the five-year period, the contracting parties would have the option to review them.

¹²² See Herbert Broom, *Legal Maxims* (T & JW Johnson Law Booksellers 1845) 38. For more details and case law about the difference between statutes expired and repealed, see Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses* (Routledge 2017) 8ff.

¹²³ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 70 Paragraph 1.

¹²⁴ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 59 Paragraph 2.

'although a later treaty for a fixed term will not necessarily abrogate an earlier treaty with longer or indefinite duration, there is likely to be a presumption that the Parties intended that effect. The earlier treaty will only be considered as suspended in operation if it appears from the later treaty, or it is otherwise established, that that was the intention of the Parties'.¹²⁵

Furthermore, the construction of the sunset clause is of paramount importance. When Parties draft the sunset clause, they might select a more complex framework for the sunset clause with different expiration dates for different parts of the treaty. In addition, they might select different expiration dates for different Parties.¹²⁶ Such a complicated construction is selected, for instance, in investment treaties. As it was seen above, one sectional sunset clause terminates the provisions of the treaty for the signatories and for future investors, and another sunset clause terminates the provisions of the treaty, on a different day, for the investments already made.

Turning to the second consequence of the automatic expiration, **it is reasonable to assume that a treaty subject to a sunset clause on the expiration day loses its legal force.** The well-known Latin maxim '*expressio unius est exclusio alterius*' on legal interpretation, (expression of one is the exclusion of the other), applies to sunset clauses.¹²⁷

Hence, the determination that the treaty will expire on a certain date, or after a certain period means that from that date or that period onwards, the treaty is not valid. In theory, though, given the nature of international law with a plethora of sources of law¹²⁸ this is not always the case. For instance, if a treaty subject to a sunset clause codifies or confirms customary law, then it is possible to argue that the expiration of the treaty does not affect the validity of the customary law.¹²⁹ To put it simply, with the expiration of the treaty, the source of law expires, not the law, as the law is preserved via a different source, the customary law.

4.1.2. Entrenchment effect of sunset clauses

One of the conclusions drawn from above is that sunset provisions in investment treaties make some provisions binding for the states for years,¹³⁰ and this is the so-called entrenchment effect of such clauses. If one Party unilaterally withdraws or denounces the investment agreement, such clauses allow for the extension of the legal force of the investment agreement's provisions for the investments already admitted. Hence, the protection by the investment agreement is artificially extended, depending on the duration of the sunset clause, thus enhancing legal certainty. The entrenchment effect of sunset clauses led some authors to term such clauses in investment treaties as 'survival clauses'.

¹²⁵ Anthony Aust, 'Treaties, Termination' in Anne Peters and Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP, 2012) available at www.mpepil.com (last date accessed 31 August 2021).

¹²⁶ See above, at Part 2.1, the analysis on the construction of the clause, and in particular the distinction between entire and sectional sunset clause.

¹²⁷ This canon of construction, is also expressed as *expressum facit cessare tacitum*, and means broadly that mentioning one thing may exclude another thing. See FAR Bennion, *Bennion on Statutory Interpretation* (5th edn, Lexis Nexis 2008) 1250.

¹²⁸ On the sources of International Law see Statute of the International Court of Justice, 33 UNTS 993, Article 38.

¹²⁹ About the relationship and co-existence of different sources of international law, namely customary laws and treaty provisions see Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986 [175].

¹³⁰ See above at 2.2.1.

For instance, the recent BIT between the EU and Vietnam which includes a 15-year sunset clause in Article 4.15 provides that 'In the event that this Agreement is terminated pursuant to Article 4.10 (Duration), the provisions of Chapter 1 (Objectives and General Definitions), Articles 2.1 (Scope), 2.2 (Investment and Regulatory Measures and Objectives) and 2.5 (Treatment of Investment) to 2.9 (Subrogation), the relevant provisions of Chapter 4 and the provisions of Section B (Resolution of Disputes between Investors and Parties) of Chapter 3 (Resolution of Disputes between Investors and Parties) shall continue to be effective for a further period of 15 years from the date of termination, with respect to investments made before the date of termination of the present Agreement, [...]'.¹³¹

Here the sunset clause creates a transitional period following the denunciation of the investment treaty between the period during which investments already made are protected, and the period during which they are not protected anymore.

In relation to the ECT, when Italy withdrew, it remained liable for legal actions impacting investments made during its membership in the ECT, and multiple cases were brought before investment tribunals.¹³² The case *Greentech and NovEnergia v. Italy* exemplified the uncontested entrenchment effect of sunset clauses. Italy, which ratified the ECT on 5 December 1997, notified of its withdrawal from the ECT with effect in January 2016. Given the effect of the twenty-year sunset clause in the ECT, the tribunal held that the 'withdrawal does not affect the Tribunal's jurisdiction in the present arbitration in light of the ECT's sunset clause, providing that the ECT continues to apply for twenty years from the date when such notice takes effect'.¹³³

Such an entrenchment effect impacts the relationship between present and future policymakers as it is possible for present policymakers to entrench onto future policymakers specific policy options in the investment sector.

Entrenchment serves three purposes in relation to investments:

- first, to preserve the regulatory and business environment in the host state. As mentioned above, stability is a crucial factor in the world of investments. Sunset clauses guarantee that for a certain period of time, policy changes shall comply with the provisions of the investment treaty.
- second, to signal a fertile ground for investments. Such a message is especially important in countries with a hostile past towards foreign investments, which need to show a transformation and a break from such past, and
- third, to indicate that in the foreign investment area, there is a common policy among political fractions in the host state, and that present and future policy makers would follow such an investment policy.

However, sunset clauses with entrenchment effect are not only confined to investment treaties. For instance, several agreements in which Euratom is a Party include sectional sunset clauses with entrenchment effect. Suffice to mention here the Agreement between the European Atomic Energy Community and the Government of Australia for cooperation in the peaceful uses of nuclear energy. Article 18 paragraph 3 prescribes that 'notwithstanding the suspension, termination or expiration of this Agreement or any cooperation hereunder for any reason, the obligations in Articles III, IV, V, VI, VII,

¹³¹ EU-Vietnam Investment Protection Agreement (30 June 2019) Article 4.15.

¹³² See for instance *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3); *Belenergia S.A. v. Italian Republic* (ICSID Case No. ARB/15/40); *Eskosol SPA. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50).

¹³³ *Greentech Energy Systems and Novenergia v. Italy* (registered 7 July 2015) fn 142.

VIII, IX, X, XI, XII and XIII shall continue in effect so long as any nuclear material, non-nuclear material or equipment subject to these articles remains in the territory of the other Party or under its jurisdiction or control anywhere or until it is mutually determined by the Parties in accordance with the provisions of Article IV that such nuclear material is no longer usable, or is practicably irrecoverable for processing into a form in which it is usable, for any nuclear activity relevant from the point of view of safeguards.¹³⁴ As a result, a series of articles continue their force independently from the termination of the agreement for the Parties, and their expiration date depends on a different timetable.

4.2. Limit on legislative power

States have availed themselves of the entrenchment of investment treaties and this has led to their proliferation. However, their proliferation inevitably has led to a backlash for several reasons, namely the favorable treatment of foreign investment vis a vis the domestic investment, the restrictions on policymaking and the entrenchment effect of such agreements binding future lawmakers. As Peinhardt and Wellhausen remark, 'investment treaties limit a state's sovereignty and grant rights to foreign investors, in exchange for the hope of more investment. Unsurprisingly, domestic audiences are sometimes frustrated with this tradeoff.'¹³⁵

Domestic audiences are frustrated because a distinction takes place. Domestic investments may suffer from policy changes while the protection of international investments stays intact. Furthermore, such frustration is exacerbated because 'obligations emerging from investment agreements have limited and limit substantially the policy options of governments around the world to respond to legitimate governance challenges.'¹³⁶

Legislative power to regulate, review and adopt policies and face challenges at a national level is inherent in the idea of sovereignty. Most importantly, lawmakers in principle control the agenda in the law making process.¹³⁷ Representatives of the people often find themselves in an awkward position not being able to meet their promises to their voters as their policy options might be constrained due to international obligations and commitments agreed upon by policymakers even many years before.

In principle, representatives of the people can always exercise their sovereignty to escape from all of their international commitments, except from the *jus cogens* obligations.

However, as it was mentioned in Chapter 2, *pacta sunt servanda*, is a fundamental principle in international law limiting state sovereignty. In practice, such a principle implies that Contracting Parties in a treaty shall comply with both procedural and substantive aspects of a treaty. Procedural aspects of the treaty are, for instance, the notice for withdrawal, and time limitations. On the other hand, substantive aspects of an investment treaty are, for instance, the prohibition of arbitrary or

¹³⁴ Agreement between the Government of Australia and the European Atomic Energy Community (Euratom) for cooperation in the peaceful uses of nuclear energy OJ L 29, 1.2.2012, p. 4–12 Article 18 paragraph 3.

¹³⁵ see Clint Peinhardt, Rachel L. Wellhausen, *Withdrawing from Investment Treaties but Protecting Investment* (2016) 7 *Global Policy* 571.

¹³⁶ Suzanne A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', (2010) 13 *Journal of International Economic Law* 1037.

¹³⁷ Regarding the importance of agenda control see Richard D McKelvey, 'Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control' (1976) 12 *Journal of Economic Theory* 472.

discriminatory impairment of a foreign investment, the duty to pay compensation, and the establishment of an alternative dispute resolution system such as arbitration.

In line with the aforementioned, sunset clauses in international treaties set the framework for treaties' expiration in case of a unilateral withdrawal. Although the VCLT and the VCLT 1986 do not regulate the specific issue of 'sunset clauses', Article 54 entitled 'termination of or withdrawal from a treaty under its provisions or by consent of the Parties' has an indirect obligation on states Parties in Treaties in relation to adherence to a sunset clause. In particular, Article 54 prescribes that 'the termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty,'¹³⁸

In general, non-conformity with treaty provisions creates state responsibility. However, in relation to investment treaties, given that rights to third parties (investors) are created (the expiration of which is set by the sunset clause) the non-conformity is challenged before international tribunals. Such *modus operandi* is the novelty, which emerged in relation to state liability.¹³⁹

Thus, the use of sunset clauses and their entrenchment effect undermines the legitimacy of present and future lawmakers by throwing away the key to unlock the handcuffs that investment treaties have placed in the hands of the state. **The duration of the sunset clause is of paramount importance for the force of the entrenchment effect. To illustrate this, it suffices to compare and contrast the sunset clauses in the (CETA) and the ECT. In both treaties, investments are protected for a number of years once Parties express their intention to terminate the treaty. However, CETA contains a three-year sunset clause,¹⁴⁰ while ECT contains a 20-year sunset clause. Accordingly, the entrenchment effect of the sunset clause in ECT lasts longer and binds policymakers and lawmakers for a longer period of time.**

The policy making of future generations is restricted even in relation to sensitive legislative and administrative measures that 'would fall within the exclusive purview of sovereign states or that implement the host state's other international obligations'.¹⁴¹ Indicative is the opinion of the Arbitral Tribunal in the case *CMS Gas Transmission Co v. Argentine Republic*. At first instance, the Tribunal held that it 'does not have jurisdiction over measures of general economic policy adopted by the Republic of Argentina and cannot pass judgment on whether they are right or wrong'.¹⁴² However, it concluded that it does have 'jurisdiction to examine whether specific measures affecting the Claimant's investment or measures of general economic policy having a direct bearing on such investment have been adopted in violation of legally binding commitments made to the investor in treaties, legislation or contracts.'¹⁴³

¹³⁸ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 54 paragraph a.

¹³⁹ see Santiago Montt, State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation (Hart Publishing 2009) 6.

¹⁴⁰ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11, 14.1.2017, p. 23–1079.

¹⁴¹ Suzanne A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements, (2010) 13 Journal of International Economic Law 1037, 1038.

¹⁴² *CMS Gas Transmission Co v. Argentine Republic*, (ICSID Case No. ARB/01/08), Decision on Jurisdiction, July 17, 2003, para. 33.

¹⁴³ *CMS Gas Transmission Co v. Argentine Republic*, (ICSID Case No. ARB/01/08), Decision on Jurisdiction, July 17, 2003, para. 33.

In practice, the regulatory framework in force at the time of the investment is entrenched. For instance, in the case *Greentech and NovEnergia v. Italy*,¹⁴⁴ the dispute arose because the Italian government took some measures, which changed the regulatory framework in force. Namely, the government prematurely cut tariff incentives for photovoltaic plants originally offered for 20-year period, it modified the taxation regime and minimum guaranteed price scheme, it canceled inflation adjustment and finally, it imposed new fees.

The exchange between the claimants and the respondents on this issue is illustrative. On the one hand, claimants argued that '[i]t is common ground in investment treaty jurisprudence that when an investor's expectations are based on explicit assurances from the State – as in the present case – the State has accepted limitations on its right to regulate in ways that undermine those assurances.'¹⁴⁵ On the other hand, the Respondent, on behalf of the Italian Government claimed that the meaning of legitimate expectations within the context of investments must accord 'due relevance to the sovereign right of States to progress their legislation.'¹⁴⁶

Eventually, the tribunal sided with the claimants holding that '[h]ost states certainly retain the sovereign prerogative to amend their laws. However, if the state gives an investor express assurances that no amendment would occur, the investor must be fairly compensated if those assurances are violated.'¹⁴⁷

4.3. Legitimate expectations and the treaty making power

The entrenchment effect of sunset clauses limits the policy options of policymakers and lawmakers at a national level. Furthermore, in a plethora of cases, it was shown that the violation and the non-adherence to the terms of the investment treaties may lead to state liability before investment tribunals.¹⁴⁸ However, as it will be seen below, the entrenchment effect of sunset clauses does not limit the options of the institutions with treaty making power.

To begin with, there is a difference between the expiration of a treaty due to a sunset clause (ex post facto expiration) and early consensual termination of a treaty, which was subject to a sunset clause (ex ante expiration). The former is ex post facto expiration as the treaty expires on the due day as defined by the sunset clause. The latter is ex ante expiration because the mutual termination of the treaty expires the sunset clause in advance.

This difference is of key importance especially for countries who want to disengage from treaties subject to sunset clauses. In principle, if a state unilaterally withdraws from a treaty, such withdrawal (or denunciation) activates the sunset clauses. Accordingly, the state is bound by the treaty's provision for the period of time set in the sunset clause. In other words, the expiration of a treaty subject to a sunset clause does not take place with the withdrawal. On the contrary, states that mutually terminate

¹⁴⁴ *Greentech Energy Systems and Novenergia v. Italy* (registered 7 July 2015).

¹⁴⁵ *Greentech Energy Systems and Novenergia v. Italy* (registered 7 July 2015) [416].

¹⁴⁶ *Greentech Energy Systems and Novenergia v. Italy* (registered 7 July 2015) [426].

¹⁴⁷ *Greentech Energy Systems and Novenergia v. Italy* (registered 7 July 2015) [452].

¹⁴⁸ On state liability in relation to investments, see Santiago Montt, *State Liability in Investment Treaty Arbitration* Global Constitutional and Administrative Law in the BIT Generation (Hart Publishing 2009).

a treaty, do not activate the sunset clauses and the expiration of the treaty takes place with the mutual withdrawal.¹⁴⁹

For instance, the Canada Model BIT 2021 in Article 57, paragraph 4 regulates the mutual termination providing that '[t]his Agreement shall remain in force unless a Party delivers to the other Party *a written notice of its intention to terminate the Agreement. The termination of this Agreement will be effective one year after the written notice of termination* has been received by the other Party. In respect of investments or commitments to invest made prior to the date of termination of this Agreement, Articles 1 through 56, as well as paragraphs 1 and 2 of this article, shall remain in force for 15 years.'¹⁵⁰

Accordingly, the one-year sunset clause is activated when a party submits a written notice of its intention to terminate the Agreement and such notice is received by the other party, while the 15-year sunset clause is activated once a year has passed from the day the other party received the written notice of termination. In other words, sunset clauses are attached to the unilateral intention to terminate the agreement. *E contrario*, the mutual agreement to terminate the treaty is not regulated by the agreement, and therefore, its regulation falls within the general framework of the VCLT. According to Article 54 the termination may take place 'at any time by consent of all the parties after consultation with the other contracting States.'¹⁵¹

In like manner the ECT Article 47, which provides in paragraphs 2 and 3 that '(2) Any such *withdrawal* shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depositary, or on such later date as may be specified in the notification of withdrawal. (3) 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.*' regulates the unilateral withdrawal from the agreement.

Accordingly, when Italy unilaterally withdrew from the ECT, investments already made in Italy by other contracting Parties were covered by the protection of the ECT due to the activation of the sunset clause.¹⁵² On the other hand, in the hypothetical scenario that Signatory Parties of the ECT decided to terminate the treaty, then the treaty would have concluded as if it had never existed.

In case a Contracting Party in a treaty withdraws or notifies its intention to withdraw, the sunset provisions are triggered. Consequently, as it was accurately put, sunset clauses 'tend to preserve all of the provisions of an [investment treaty], both procedural and substantive, for the benefit of an investor for a certain period after its termination'.¹⁵³ Procedural and substantive rights mean that firstly, foreign investors can procedurally invoke a claim before arbitral tribunals pursuant to the dispute settlement provisions of the investment treaty with the automatic consent of the host state, and that secondly

¹⁴⁹ On this issue, see also James D. Fry and Odysseas G. Repousis, 'Intertemporality and international investment arbitration: protecting the jurisdiction of established tribunals' (2015) 31 *Arbitration International* 213, 231 ff.

¹⁵⁰ Canada Model BIT 2021 in Article 57 paragraph 4.

¹⁵¹ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 54 paragraph b.

¹⁵² See for instance, *Hamburg Commercial Bank v. Italy* *Hamburg Commercial Bank AG v. Italian Republic* (ICSID Case No. ARB/20/3); *Veolia Propreté v. Italy* *Veolia Propreté SAS v. Italian Republic* (ICSID Case No. ARB/18/20); *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration PLC v. Italian Republic*, ICSID Case No. ARB/17/14.

¹⁵³ Tania Voon, Andrew Mitchell, James Munro, Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29 *ICSID Review* 451, 456.

foreign investors can rely on the provisions of the terminated treaty to base the substance of their claims.¹⁵⁴

However, some sunset clauses are drafted with ambiguity in a way for it to be possible to argue that they are activated by both unilateral terminations and mutually agreed upon terminations.

To exemplify that, the Italy-Romania BIT was terminated by consent in 2010. The five-year sunset clause was included in Article 11 which provided that '2) This Agreement shall remain in force for 10 years from the date of completion of the legal procedures referred to in paragraph 1 of this article and shall be renewed for a further period of five years, unless one of the two Parties denies it By written notice, one year before any expiry date, paragraph 1 of this article, and shall be renewed for a further five-year period, unless one of the two Parties gives notice thereof in writing one year before Any expiration date. 3) In the case of investments made before the expiry date of this Agreement, as provided for in this Article 11, the provisions of Articles 1 to 1 shall remain in force for another five years after the above mentioned dates. Article 11, the provisions of Articles 1 to 1) shall remain in force for another five years after the above-mentioned dates.'¹⁵⁵

Interestingly, a notice of arbitration was submitted in August 2012 during that five-year extension period which led to *Stefano Gavazzi v. Romania*.¹⁵⁶ However, the effectiveness of the sunset clause and the extension of the protectionist regime for the extra period after the termination of the investment treaty was not disputed.

Sovereign states can always terminate investment agreements and have the sunset clause expired in advance. As Roberts clarifies, 'Investors cannot argue that, in investing, they had a legitimate expectation that the investment treaty would continue to cover their investment, at least for the period of the survival clause. Given the sovereign nature of states, such an expectation is not "legitimate" and any argument based on it is circular'.¹⁵⁷

In practice and for more legal certainty, it is argued that while sovereign states can at any time mutually terminate investment agreements, in order to do so, they need to make specific reference to the sunset clauses in their termination agreement.¹⁵⁸ In fact, 23 EU Member States reached an agreement terminating their intra EU BITs along with the sunset clauses. In particular, Article 3 entitled 'Termination of possible effects of Sunset Clauses' prescribes that 'Sunset Clauses of Bilateral Investment Treaties listed in Annex B are terminated by this Agreement and shall not produce legal effects, in accordance with the terms set out in this Agreement.'¹⁵⁹

In conclusion, Contracting Parties to a treaty, subject to sunset clause may consent to terminate the treaty. Unless it is provided otherwise, such termination does not activate the sunset clause. Obviously,

¹⁵⁴ For more details on the procedural and substantive rights of investors see Francisco Gonzalez de Cossio, 'Investment Protection Rights: Substantive or Procedural?' (2011) 26 ICSID Review 107.

¹⁵⁵ Italy - Romania BIT (1990) Article 11.

¹⁵⁶ *Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25).

¹⁵⁷ Anthea Roberts, 'Triangular treaties: the nature and limits of investment treaty rights' (2015) 56 Harvard International Law Journal 353, 411.

¹⁵⁸ Tania Voon, Andrew Mitchell, James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29 ICSID Review 451.

¹⁵⁹ Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union 29.5.2020 Official Journal of the European Union L 169/1.

the consent of the Parties is a necessary condition, which is easier to achieve in bilateral treaties than in multilateral treaties.¹⁶⁰

What is the legal effect of the mutual termination of an investment agreement? In case an investor brings a claim based on the terminated BITs before an investment tribunal, it is expected that the tribunal would lack jurisdiction. At this point, it is significant to clarify however, that in the case of mutual termination, cases that have already started before arbitration tribunals are not affected.¹⁶¹

¹⁶⁰ For more analysis on the difference between reaching consent in bilateral treaties and reaching consent in multilateral treaties see Part 6.4.

¹⁶¹ See *Nottebohm Case (Lichtenstein v Guatemala) (Preliminary Objection)* [1953] ICJ Rep 111; *Electricity Company of Sofia and Bulgaria Case (Belgium v Bulgaria) (Preliminary Objection)* [1939] PCIJ Series A/B. 77.

5. SUNSET CLAUSES IN ECT AND CONFLICT WITH OTHER TREATIES

5.1. Conflict between international agreements

Successive norms regulating the same subject matter is an old-rooted problem tantalising every legal system. While in systems with hierarchical structure and centralised law making authority, like the national legal order, the problem of normative conflicts can be clearly solved guaranteeing the coherence and effectiveness of the law; in the international system this issue is more complicated. There are two main reasons: first, the international system lacks a hierarchy of norms (*save jus cogens*), and second it lacks a centralized law-making authority.¹⁶² As a result, states may end up bound by different treaties regulating the same subject matter in a different manner. Accordingly, these states would be in a situation practically impossible to meet their overlapping and contradictory obligations under international law.

VCLT regulates this issue with a number of provisions. First, Article 30 of the VCLT entitled 'Application of successive treaties relating to the same subject matter'¹⁶³ regulates this topic with the following logical pattern. Beginning with the conflict rule according to which the primacy of the UN Charter is affirmed in case of conflict between the obligations of the Members of the UN Charter treaty and their obligations under any other treaty.¹⁶⁴ Second, the incorporation of a conflict rule according to which, a conflict clause may be incorporated in a treaty, with the aims of granting priority to another treaty.¹⁶⁵

In the case there is no specific rule of conflict in two or more successive treaties, the VCLT differentiates between situations of whether successive treaties are identical or not. Paragraph 3 prescribes that in case 'all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.'¹⁶⁶

On the other hand, in case 'the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations'.¹⁶⁷

As it is accurately said, Article 30 codifies certain well-established interpretation principles of customary international law such as the *lex posterior derogat legi priori* (later law repeals an earlier law) principle

¹⁶² For more details on the fragmentation of International law see Report of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (A/CN.4/L.682).

¹⁶³ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 30.

¹⁶⁴ See United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 30 paragraph 1 in combination with United Nations, Charter of the United Nations, 1945, 1 UNTS XVI, article 103.

¹⁶⁵ See United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 30 paragraph 2.

¹⁶⁶ See United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 30 paragraph 3.

¹⁶⁷ See United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 30 paragraph 4.

and the *pacta tertiis nec nocent nec prosunt* (a treaty binds the Parties and only the Parties; it does not create obligations for a third state).¹⁶⁸

Interestingly, while Article 30 does not incorporate the principle *lex specialis derogate legi generali*, the interpretation principle continues to exist independently alongside Article 30 as an additional interpretation rule in customary international law.¹⁶⁹

In relation to successive treaties, the key issue is the overlap.¹⁷⁰ The drafters of the VCLT used the term 'the same subject matter' to describe the scope of the conflict of norms instead of a more narrow term such as 'specific subject matter'.¹⁷¹ The terminology selected allows wider application of Article 30 of the VCLT.¹⁷² Interestingly the alternative terms that were proposed and rejected were 'conflict', 'conflicting treaty provisions' or 'treaties having incompatible provisions'.¹⁷³

As Jenks remarked earlier, conflict 'in the strict sense of direct incompatibility arises only where a party involved in two treaties cannot simultaneously comply with the obligations under both'.¹⁷⁴ On the issue of the 'same subject matter' the ILC's Report on Fragmentation of International Law described a test which 'is resolved through the assessment of whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another. This "affecting" might then take place either as strictly preventing the fulfilment of the other obligation or undermining its object and purpose in one or another way'.¹⁷⁵

In reality, Courts perform a factual test, however in practice, there is no consistency on the way the relationship between two treaties is resolved. To exemplify the different approaches, suffice to mention here the different ways courts interpreted the relationship between EU Treaties and intra-EU BITs.

On the one hand, the holding from the European Court in *Achmea* Judgment clearly recognizes this conflict. In particular the Court held that 'Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept'.

Interestingly, the Investment Tribunal in the *Adamakopoulos* case regarding the relationship between EU Treaties and intra-EU BITs reached the exact opposite conclusion. In particular, the Investment Tribunal holds that 'The Tribunal is of the view that Articles 59 and 30(3) of the VCLT are potentially applicable to the question of the Tribunal's jurisdiction. BITs deal with investment and dispute

¹⁶⁸ Kerstin Odendahl, 'Article 30. Application of successive treaties relating to the same subject matter' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 508.

¹⁶⁹ Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009) 409.

¹⁷⁰ In case two treaties with the same subject matter are signed by the same parties, article 59 of the VCLT applies. VCLT Article 59(1) provides that 'A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.'

¹⁷¹ Kerstin Odendahl, 'Article 30. Application of successive treaties relating to the same subject matter' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 510.

¹⁷² Draft Articles on the Law of Treaties with commentaries 1966, Commentary to Art 30, 214 para 1, 217 para 13.

¹⁷³ Kerstin Odendahl, 'Article 30. Application of successive treaties relating to the same subject matter' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 510.

¹⁷⁴ See C Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401, 426-427.

¹⁷⁵ International Law Commission, Report of the Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. No. A/CN.4/L.682, dated April 13, 2006, RL-0027.

settlement. The EU Treaties also deal with investment and dispute settlement. Thus, at a certain, general, level the treaties deal with the same subject matter. But at a more specific level they deal with different subject matters. BITs deal with general obligations on states relating to foreign investment within the countries of the contracting parties but they also provide a mechanism for nationals of one party to bring a claim against another party, something that is not provided for in the EU Treaties. Under the EU regime claimants are left in the hands of domestic courts only, something that BITs do not provide for. In fact, BITs provide specifically for an alternative to determination by national courts. In that respect, the EU Treaties and the BITs do not deal with the same subject matter.¹⁷⁶

Comparing and contrasting the decision from the European Court and the Investment Tribunal, the former court maintains that EU Treaties are in conflict with intra-EU BITs, while the Investment Tribunal explicitly rejected such argument. As a result, Courts examine the case separately, and the term 'same subject matter' may be interpreted narrowly or broadly, depending on various conditions, such as the facts of the case, the particular construction of the treaties, the legal dispute etc. In like manner, in theory, divergent views are expressed about whether the normative conflict should be defined strictly.¹⁷⁷ **All in all, a conflict between two treaties is not an academic exercise; Conflicts arise when a court, authority or person in a specific situation does not know what law to apply, or what obligation to abide by.**

While the mere finding that two treaties are not in conflict under Article 30 of the VCLT, does not preclude that they are not inconsistent. To put it differently, in cases of normative divergence¹⁷⁸ it is possible to harmonize the treaties via interpretation. On the harmonious interpretation, VCLT offers guidance via Articles 31 and 32.¹⁷⁹

That said, not all areas of international law are equally prone to normative conflicts. An area particularly prone to normative conflicts is international environmental law for a number of reasons.¹⁸⁰ Suffice to mention here that environmental law is inherently a complex issue with conflicting goals due to the tension between exploitation and preservation of natural resources. In addition, until recently, at least before the Paris Agreement on Climate Change,¹⁸¹ regulatory devices were employed in a reactive manner to address specific problems; for instance, in the aftermath of environmental disasters, without addressing the interdependence of ecological issues.

¹⁷⁶ Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49 [168].

¹⁷⁷ Suffice to mention here, Wolfram Karl, 'Conflicts Between Treaties' in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1984), vii, at 467, 468; Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer 2003), 4. However, the narrow definition of normative conflict is criticized by Vranes. Vranes argues that the narrow definition of normative conflicts neglects the potential conflict between obligations, permissions and prohibitions. For more details, see Erich Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 *The European Journal of International Law* 395.

¹⁷⁸ For instance, a normative divergence would arise 'when one instrument eliminates exceptions provided for in another instrument'. See C Wilfred Jenks, 'The Conflict of Law-Making Treaties', (1953) 30 *British Yearbook of International Law* 401, 426.

¹⁷⁹ See United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 31 and Article 32.

¹⁸⁰ For a complete analysis on the reasons explaining why international environmental law is prone to conflicts, see Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer, 2003) 7.

¹⁸¹ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

5.2. The conflict between EU Treaties and other International Treaties

Since the foundation of the European Economic Communities and the Single European Act, a period of relative stability and continuous treaty revision and replacement took place marking the establishment and expansion of the EU regulatory framework over an increased range of areas.¹⁸² Some areas, however, were regulated by ordinary international law. Moreover, with the enlargement with the new Member States brought under the umbrella of EU law relations between old Member States and new Member States were still regulated by ordinary international treaties.

International relations between Member States may be governed by international law insofar as the international agreements are compatible with European law. The Court of Justice of the European Union (CJEU) in Case C-478/07 *Budějovický Budvar*¹⁸³ emphatically held that bilateral agreements concluded between two Member States cannot apply in the relations between those States, if found to be contrary to the EU Treaties.

Later on, in the *Achmea* Judgment, the CJEU ruled that investment arbitration provisions contained in intra-EU BITs are incompatible with EU law.¹⁸⁴ The Court elaborated on the primacy of EU Treaties over international agreements holding that 'an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court.'¹⁸⁵

Moreover, in relation to the investment arbitration system, the CJEU *inter alia* remarked that the system is unnecessary in light of the common values shared among the Member states, enshrined in Article 2 of the TEU and the mutual trust between the Member States.¹⁸⁶ Furthermore, the Court ruled that the investment arbitration system hinders the autonomy of the EU legal order, in the act of preserving the judicial system established and its aim to ensure consistency and uniformity in the interpretation of EU law.¹⁸⁷

The *Achmea* decision resembles decisions from national courts terminating laws in advance, which are subject to sunset clauses. Suffice to mention here a number of decision from national courts, such as the infamous *Belmarsh* case from the UK Supreme Court (at that time House of Lords) or the *Shelby County v. Holder* from the US Supreme Court.¹⁸⁸ However, courts' decisions on 'sunsetting' laws subject to sunset clauses are effective in centralized systems, in which the decision of the Supreme Court is final and creates a binding precedent on lower courts.

¹⁸² For a detail analysis of the evolution of EU Treaties see Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials* (OUP, 2020) [Chapter 1].

¹⁸³ Case C-478/07, *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH* Judgment of the Court of 8 September 2009 (ECLI:EU:C:2009:521) [98].

¹⁸⁴ Case C-284/16, *Slowakische Republik v Achmea BV* Judgment of 6 March 2018 (ECLI:EU:C:2018:158).

¹⁸⁵ Case C-284/16, *Slowakische Republik v Achmea BV* Judgment of 6 March 2018 (ECLI:EU:C:2018:158) [32].

¹⁸⁶ Case C-284/16, *Slowakische Republik v Achmea BV* Judgment of 6 March 2018 (ECLI:EU:C:2018:158) [34].

¹⁸⁷ Case C-284/16, *Slowakische Republik v Achmea BV* Judgment of 6 March 2018 (ECLI:EU:C:2018:158) [35].

¹⁸⁸ See *A and others v Secretary of State for the Home Department* [2004] UKHL 56 and *Shelby County v. Holder*, 570 U.S. 529 (2013) (US SC) respectively. For more details on the role of the Courts in relation to sunset clauses, see Antonios Kouroutakis, *The Constitutional Value of Sunset Clauses* (Routledge 2017).

In the international system of international courts, this issue becomes more complicated. In principle, decisions from international courts are effective in the subsystem of the international sphere they operate.¹⁸⁹

Hence, the recent decision of the European Court on *Achmea*¹⁹⁰ exemplifying the extent and limits of the courts in relation to the advance termination of treaties subject to sunset clauses. Given that arbitration tribunals operated in a different subsystem of the international sphere, the precedent of *Achmea* does not bind such tribunals. To exemplify this, it is illustrative to reflect on the way several tribunals treated the *Achmea* decision. In particular, in the *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Poland*, the Respondent objected to the jurisdiction of the investment tribunal on the grounds that the investment treaty should be deemed to be terminated based on Poland's subsequent accession to the TEU and TFEU. However, the investment tribunal held that two treaties such as the European Treaties and a Bilateral Investment Treaty could not have the 'same subject matter', because these treaties are not 'institutionally linked' or 'part of the same regime'.¹⁹¹

In line with the previous statement, a legal working paper summarizes the ways different arbitration tribunals circumvented the precedent of *Achmea* for other intra-EU BITs. In particular, the working paper states that 'some arbitration tribunals have sought to limit its consequences for other intra-EU BITs by pointing to alleged differences in the wording of the clause on applicable law or, even less convincingly, to the fact that the arbitration was conducted under different arbitration rules. Other arbitration tribunals have taken the view that until an intra-EU BIT is formally terminated by the parties it remains applicable as a matter of international law and the tribunal cannot decline jurisdiction over the dispute.'¹⁹²

Given that a number of Investment Tribunals rejected the procedural objection based on *Achmea* judgment, the European Court with the judgment in *Poland v. PL Holdings*¹⁹³ in reality, expanded the precedent from *Achmea* to ad hoc arbitration agreements, containing identical arbitration clauses to an arbitration clause of a BIT. In addition, the European Court rejected the request to limit the temporal effects of its judgment so that it does not affect arbitration proceedings that have been initiated in good faith and concluded before the delivery of judgment. In this, the European Court held that the decision which maintained investment arbitration procedures as incompatible to EU law (namely Articles 267 and 344 TFEU) has legal force *ex tunc*.¹⁹⁴

Furthermore, to end the uncertainty, a number of EU Member states, including Austria, France, Finland, Germany, and the Netherlands with a non-paper called for the adoption of a multilateral agreement

¹⁸⁹ See above Part 5.3.

¹⁹⁰ Case C-284/16, *Slowakische Republik v Achmea BV* Judgment of 6 March 2018 (ECLI:EU:C:2018:158).

¹⁹¹ *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Poland*, ICSID Case No. ADHOC/15/1 [8.135].

¹⁹² Yves Mersch, Laurie Achtouk-Spivak, Georges Affaki, Cristina Contartese and Ramón Vidal Puig, *The new challenges raised by investment arbitration for the EU legal order* (ECB Legal Working Paper Series No 19 / October 2019) 21.

¹⁹³ C-109/20 Judgment of the Court (Grand Chamber) of 26 October 2021 *Republiken Polen v PL Holdings Sàrl* (ECLI:EU:C:2021:875).

¹⁹⁴ Cf *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37 [282]. In particular, the investment tribunal stated that 'The Tribunal thus finds that as a matter of international law, any invalidation of Article 9(2)'s stated "irrevocabl[e] consent[] in advance" to arbitration, by virtue of an incompatibility with the EU acquis pursuant to Article 11(2) of the BIT, could not be applied to invalidate a consent to arbitration that was given before the *Achmea* Judgment, but only prospectively for investors who had not yet initiated a BIT arbitration. In the Tribunal's view, this conclusion holds whether the *Achmea* Judgment itself is considered under EU law to be applied *ex nunc* or alternatively *ex tunc*.'

among the EU Member States, in order to terminate immediately Intra-EU BITs.¹⁹⁵ In fact, a termination agreement was reached on 5 May 2020 with a specific reference on the termination of the Intra-EU BITs including the sunset clauses.¹⁹⁶ Such termination agreement in reality gives effect on the CJEU's ruling in *Achmea*. Given that some EU Member States did not join the termination agreement, investment tribunals are expected to continue to deliver awards based on the remaining intra-EU BITs.

However, the enforcement of awards from arbitration tribunals creates a point of contact between the EU system and the investment arbitration system, (with the exception of ICSID awards)¹⁹⁷ so long as such enforcements claims are brought before national courts of the EU Member States. As aforementioned, a Communication from the Commission to the European Parliament and the Council stresses that the nations are under the obligation to annul any arbitral award and to refuse to enforce it.¹⁹⁸

5.3. The conflict between EU Treaties and the ECT

5.3.1. The approach of Investment Tribunals before *Komstroy*

Following the *Achmea* Judgment, legal uncertainty emerged in relation to the investment arbitration clause included in the ECT. While the Court in the *Achmea* Judgment did not refer to the ECT investment arbitration system, as the dispute over a BIT, the incompatibility became apparent. Interestingly, the termination agreement of the BITs reached among the EU Member States explicitly mentioned that the new agreement 'does not cover intra-EU proceedings on the basis of Article 26 of the Energy Charter Treaty. The European Union and its Member States will deal with this matter at a later stage'.¹⁹⁹

In fact, in a number of intra EU arbitrations that took place in relation to the ECT, the conflict between EU Treaties and the ECT arose. The argument had the following line of logic: In relation to intra-EU disputes, EU Treaties prevail over the ECT, therefore arbitration, according to Article 26 of the ECT, is not the appropriate forum and investment tribunals have no jurisdiction.²⁰⁰ This is the so-called intra EU objection jurisdiction inspired by the *Achmea* decision.

For instance, in the case *Greentech and Novenergia v. Italy*, Italy as the Respondent raised jurisdictional objections, based on the *Achmea* ruling, which was supported by an amicus brief from the EC, arguing

¹⁹⁵ Intra-EU Investment Treaties, Non Paper from Austria, Finland, France, Germany and the Netherlands cited at <https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2016/05/18/non-paper-investeringsbescherming-tussen-eu-lidstaten/intra-eu-investment-treaties-non-paper.pdf> (last date accessed August 25 2021) [5].

¹⁹⁶ Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union 29.5.2020 Official Journal of the European Union L 169/1.

¹⁹⁷ For more analysis on this issue see above text to note 69.

¹⁹⁸ Communication from the Commission to the European Parliament and the Council, 'Protection of intra-EU investment' COM/2018/547 final.

¹⁹⁹ Obviously, the fact that ECT is a multilateral treaty, this implies that the EU and the EU Member States have to negotiate with third countries before making unilateral decisions. See Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union 29.5.2020 Official Journal of the European Union L 169/1.

²⁰⁰ see *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1; *Novenergia II – Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Arb. 2015/063, Final Award, 15 February 2018, 461, CLA-195; *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, 199, CLA-184.

that the ECT is not applicable to investment disputes between EU investors and an EU Member State.²⁰¹ However, such objection was rejected as the Tribunal ruled that 'the [Achmea] decision has no preclusive effect such as to remove [the Tribunal's] jurisdiction over the present dispute.'²⁰² Likewise, the same jurisdictional objection was raised in the *Eskopol/SPA* case and was rejected by the tribunal.²⁰³

In practice, investment tribunals adopted interpretations to avoid the normative conflict between the two treaties.²⁰⁴ More specifically, investment tribunals have ruled that there is no incompatibility between treaty provisions of the EU; for instance, between Article 344 of the TFEU, which prescribes the ECJ exclusive jurisdiction to decide disputes amongst EU Member States, and the dispute resolution mechanism in the ECT based on Article 26 of ECT.²⁰⁵

It is noteworthy to mention here, an obiter dictum from an investment tribunal analysing the potential conflict between the ECT and the EU, stated that 'in case of any contradiction between the ECT and EU law, the Tribunal would have to ensure the full application of its "constitutional" instrument upon which its jurisdiction is founded. This conclusion is all the more compelling given that Article 16 of the ECT expressly stipulates the relationship between the ECT and other agreements – from which there is no reason to distinguish EU law.'²⁰⁶

In conclusion, investment tribunals have rejected claims that EU Treaties and EU law prevails over the ECT. As the decentralized international law system lacks hierarchical status among the international courts, decisions from one international court do not have the binding force to form a binding precedent to other international courts. As a tribunal has put it:

'It is useful to recall that the international legal system is a general system without any central authority from whom the entire system flows. It is composed of different legal sub-systems, which have an independent life, even if at times there may be interactions between them. As a whole, the international legal system is bound by general principles of international law, i.e., by customary international law, including norms such as *jus cogens* and *pacta sunt servanda* as discussed above. But

²⁰¹ *Greentech Energy Systems and Novenergia v. Italy* (registered 7 July 2015) [12].

²⁰² *Greentech Energy Systems and Novenergia v. Italy* (registered 7 July 2015) [395].

²⁰³ *Eskosol SPA in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Jurisdiction, 7 May 2019.

²⁰⁴ Technically speaking, such normative conflict cannot be established based on the narrow definition of conflict. As Paris Agreement imposes a set of obligations to the parties and the ECT imposes a prohibition, such divergence is not recognized as a conflict. For a more detailed analysis on the distinction between narrow and broad normative conflict in international law see Erich Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 *The European Journal of International Law* 395. Such an approach is followed for instance in the *Indonesia — Autos* case. According to the facts, a claim was brought against Indonesia that it breached the national treatment provision of the GATT, Article III. Such article imposes an obligation to the states not to discriminate between national and international like products. Indonesia argued that as a developing country, it enjoys rights under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), which permit developing countries to provisionally maintain certain subsidies. However, the panel referred to the strict definition of conflict to resolve the dispute and it ruled that: 'In international law for a conflict to exist between two treaties, . . . [their] provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations . . . Technically speaking, there is conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously.' See WTO Panel Report, *Indonesia Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS59/R, WT/DS64/R, adopted on 23 July 1998, [649]. As a result, the Panel found that there was no conflict between the obligation of Article III and the permission of the SCM Agreement.

²⁰⁵ See *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1 [340]. 'To conclude, EU law is not incompatible with the provision for investor-State arbitration contained in Part V of the ECT, including international arbitration under the ICSID Convention.' See also *Electrabel v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 [4.167].

²⁰⁶ *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.a.r.l. v. The Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016 [75].

below this level of general principles there exist various sub-systems of international law, with no precise hierarchy between the different norms established in each sub-system. Rather, each of these sub-systems is governed by its own applicable norms, and vests dispute resolution authority in particular bodies obligated to proceed under those norms.²⁰⁷

5.3.2. CJEU and the *Komstroy* Decision

For a while, the position of the CJEU on the relationship between EU Treaties and the ECT was not articulated. In fact, a number of initiatives to trigger a preliminary ruling from the CJEU on the compatibility of Intra-EU investment arbitrations according to Article 26 of the ECT with EU law were unsuccessful.²⁰⁸ Eventually, CJEU addressed this issue in the ruling of the *Republic of Moldova v Komstroy* case.²⁰⁹ The question before the Court was whether the definition of ‘investment’ according to Article 1(6) of the ECT entails any economic contribution from the investor in the host State. Interestingly, the dispute concerned investments in a non-EU Member State, namely Moldova.

But CJEU in an obiter dictum also clarified on whether Article 26 of the ECT, which provides for arbitration, is compatible with EU law insofar as arbitration resolves disputes between EU based investors and EU Member States. In particular, the Court ruled that ‘Article 26(2)(c) ECT must be interpreted as not being applicable to disputes between a Member State and an investor of another Member State concerning an investment made by the latter in the first Member State.’²¹⁰

Such an approach is in line with the *Achmea* decision in relation to intra-EU investment arbitrations based on BITs. However, **the disengagement of the EU Member States from the ECT is subject to a different degree of complexity.** While in relation to intra-EU BITs, EU Member States could mutually terminate the bilateral treaties and at the same time terminate the sunset clauses; as the ECT is a multilateral treaty that involves EU Member States with third countries.²¹¹ Suffice to mention here, that termination of the ECT requires the consensus from every Party, while the interests between EU Member States and third countries might diverge on this matter.²¹²

On the other hand, it remains to be seen how investment tribunals would treat the judgment of the CJEU on the inapplicability of Article 26 of the ECT at intra-EU level. However, **it is anyone’s guess whether investment tribunals would show deference on the CJEU and respect CJEU prerogative to interpret and apply EU law.** Such uncertainty arises from the fact that after *Achmea* decision, some

²⁰⁷ *Eskosol SPA in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Jurisdiction, 7 May 2019 [181].

²⁰⁸ For instance, Spain, as the Respondent in the arbitration dispute (*Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case No. 2015/063.) while it submitted a challenge against the arbitral award before the Svea Court of Appeal in Stockholm, it requested the Court of Appeal to request a preliminary ruling from the CJEU in order to clarify whether Article 26 of the ECT is applicable between the EU Member States, and if that is the case, whether Article 26 of the ECT is compatible with the EU Treaties. Such request, if it were successful, it would have triggered a decision from the CJEU. The Court of Appeal, though, rejected the request. For more details see Case No. T 4658-18, *Kingdom of Spain v Novenergia II - Energy & Environment (SCA), SICAR*, 27 May 2020 (Svea Court of Appeal).

²⁰⁹ Case C-741/19, *Republic of Moldova v Komstroy*, a company the successor in law to the company Energoalians, Judgment of 2 September 2021 (ECLI:EU:C:2021:655).

²¹⁰ Case C-741/19, *Republic of Moldova v Komstroy*, a company the successor in law to the company Energoalians, Judgment of 2 September 2021 (ECLI:EU:C:2021:655). [66].

²¹¹ For more analysis on this issue see below Part 6.2.

²¹² For a full list of the Member States of the ECT see above Part 3.3.

arbitration tribunals did not show deference on the CJEU, and on the contrary sought to limit the consequences of Achmea for the intra-EU investment treaties and ad hoc agreements.²¹³

5.4. The conflict between ECT and Paris Agreement

Since the adoption of the United Nations Framework Convention on Climate Change (UNFCCC) in 1992 and the adoption of the Kyoto Protocol in 1997 to operationalize the Convention, an agreement was reached in Paris in 2015. The Paris Agreement on Climate Change is a landmark international accord for the environment adopted during the 21st Conference of the Parties of the United Nations Framework Convention on Climate Change.²¹⁴

The subject matter of the Agreement addresses climate change and its negative impacts.²¹⁵ In doing so, such agreement requires the signatory Parties to make commitments nationally determined contributions (NDCs) and progressively fortify them.²¹⁶ In numbers, the aim is to hold the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees Celsius.²¹⁷ Furthermore, for the successful climate mitigation and adaptation efforts, the Paris Agreement creates a framework for transparent monitoring and reporting, and exchange information and know-how among various stakeholders.²¹⁸

The universality of climate change led nearly every state on earth to endorse the Paris Agreement, which went into force on November 4, 2016. This universal acceptance, however, does not mean that this agreement enshrines *jus cogens*.

While universal acceptance of the Paris Agreement indicates that the international community accepted and recognized the Paris Agreement as an ordinary norm in international law, currently no clear evidence exists to demonstrate that the vast majority of states have accepted and recognized the non-derogability of the provisions of the Paris Agreement.²¹⁹ Had the Paris Agreement been new *jus cogens*, Article 64 of the VCLT on the 'emergence of a new peremptory norm of general international

²¹³ For more analysis see above Part 5.2.

²¹⁴ For more details on the legal and policy framework of the United Nations Climate Change Regime see Joanna Depledge, Foundations for the Paris Agreement, in Daniel Klein, María Pía Carazo, Meinhard Doelle, Jane Bulmer, Andrew Higham, *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017) 27.

²¹⁵ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [Preamble].

²¹⁶ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, Article 3.

²¹⁷ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, Article 2.

²¹⁸ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, Article 4.

²¹⁹ Two are the criteria for the identification of *jus cogens*. The first is the existence of a norm of General International Law and second the acceptance and recognition by the international community as a whole of the norm's non-derogable nature.' See Report of the International Law Commission, Chapter VIII: Peremptory norms of general international law (*jus cogens*) in 'Interim Report Drafting Committee 2018' (A/73/10).

law' would have applied, and any existing treaty in conflict with the provisions of the Paris Agreement, would become void.²²⁰

The goals of the Paris Agreement, such as the reduction of gas emission and the limit on climate pollution potentially contradict the special protection countries guarantee on fossil fuel investments under the ECT. To exemplify this, a report found that 'in Europe, the ECT protects at least 47 coal plants that have remaining economic life'²²¹ and simultaneously the EU has submitted in December 2020 its updated and enhanced NDCs with the target to 'reduce emissions by at least 55% by 2030 from 1990 levels'²²²

To put it differently, in one regard, according to the Paris Agreement, the Parties of the Convention are required to put forward their best efforts through the creation of NDCs to reduce gas emissions and cut climate pollution. On the other hand, the ECT requires the Parties of the Treaty to respect already made investments in the energy sector, including fossil fuel investments. Hence, the conclusions from a recent report stressing that 'Investor-state dispute settlement and compensation for stranded fossil fuel assets is raising the cost of climate action'²²³ were not unexpected.

While there is no conflict provision in the Paris Agreement to regulate its relationship with other treaties, the ECT contains two provisions relevant to this discussion. First, the Preamble of the ECT has a reference to the United Nations Framework Convention on Climate Change under the auspices of which the Paris Agreement was signed.²²⁴ Accordingly, it could be argued that 'this preamble reference is relevant to the interpretation of the ECT.'²²⁵ Indeed, VCLT in Article 31 provides that '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' and it also states that 'there shall be taken into account, together with the context: any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;'.²²⁶ **Based on the provision of the ECT's Preamble it is possible to bring a substantive objection** before an investment tribunal with the claim, for instance, that the change of the regulatory framework in the energy sector is in line with the Paris Agreement.²²⁷

Second, Article 16 of the ECT entitled 'Relation to Other Agreements' provides that:

²²⁰ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 64.

²²¹ Kyla Tienhaara and Lorenzo Cotula, Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets (IIED 2020) 28.

²²² Update of the NDC of the European Union and its Member States (17 December 2020) [27] available at <https://www4.unfccc.int/sites/NDCStaging/pages/Party.aspx?party=EUU> (last date accessed 31 August 2021).

²²³ Kyla Tienhaara and Lorenzo Cotula, 'Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets' (IIED 2020).

²²⁴ See Energy Charter Treaty 2080 UNTS 100. ECT 1994 [Preamble] 'Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects;'

²²⁵ Edna Sussman, 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development' (2007) 14 ILSA Journal of International & Comparative Law 391, 403. ECT itself in Article 19 includes provisions on 'Environmental Aspects' see Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 19.

²²⁶ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 31.

²²⁷ For more analysis about the prospects of such substantive objection before Investment Tribunals, see below Part 6.1.

'Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favorable to the Investor or Investment.'²²⁸

The dispute here is over whether Article 16 is a conflict rule or an interpretation rule. If considered a conflict rule, such provision is relevant to Article 30 of the VCLT. If considered an interpretation rule, such provision is relevant to Article 31 of the VCLT. In *Eskosol v Italy* for instance, divergent views on the nature of Article 16 were expressed among the parties.²²⁹

Regardless of such dispute, Article 16 of the ECT resolves the conflict or the overlap between two treaties with the "same subject matter". This reference refers to the narrow scope of Article 16 of the ECT. For example, such provision is activated in the instance of two contracting parties to the ECT that signed for a BIT with dispute resolution provisions. Then according to Article 16, the treaty with the most favorable regime for the investor shall apply.

Further, it can be argued that Article 16 of the ECT provides a presumption that there is no conflict between the ECT and other international agreements. It stipulates that the ECT and another agreement shall not be 'construed'. i.e. interpreted, as derogating from each other. The condition 'where any such provision is more favorable to the Investor or Investment' limits the presumption. Therefore, where the other agreement is more favorable, the presumption would lean the other way i.e. that an incompatibility is at hand.

This interpretation of the ECT is confirmed by Decision 1 to the ECT on the application of the Svalbard Treaty, which stipulates that 'in the event of a conflict between the treaty concerning Spitsbergen of 9 February 1920 (the Svalbard Treaty) and the Energy Charter Treaty, the treaty concerning Spitsbergen shall prevail to the extent of the conflict'. When the drafters of the ECT wanted to achieve a rule on conflict of laws, they used the words 'shall prevail'.

The question can of course be raised whether the drafters of the ECT intended to invoke the application of Article 30(2) of the VCLT and whether the phrase 'construed to derogate' could be considered to be equivalent to 'considered as incompatible' although they do not carry the same meaning. However, even if that would be the case.

As Article 16 of the ECT does not provide a rule for when a mutually supportive construction is not possible or the obligations under the ECT and another treaty are incompatible, such situation would be solved by the default rule in Article 30 of the VCLT. To the extent that a mutually supportive construction of the Paris Agreement and the ECT is not possible, as the Paris Agreement is the later agreement and all Parties to the ECT have signed the Paris Agreement (and all but Yemen and Turkey has ratified it), the ECT can only be applied to the extent in which it is compatible with the Paris Agreement.

²²⁸ Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 16..

²²⁹ See *Eskosol SPA in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Jurisdiction, 7 May 2019 [71].

6. CONCLUSIONS AND POLICY RECOMMENDATIONS

6.1. Remaining in the ECT and raising procedural and substantive objections before investment tribunals

The ECT entered into force on April 1998, and just three years later, in 2001, the first case before the arbitral tribunals was registered. Up until January 2021, a total of 135 cases have been recorded²³⁰ making the ECT a very useful legal instrument for investors to challenge governmental policies before arbitration- and making it the 'most frequently invoked'.²³¹ According to the available data, the claimant (investor) in most of the cases, based on either an award or a settlement, was compensated,²³² making the ECT an effective mechanism of protection and a substantive limit on governmental policies in the energy sector.

States have the option to remain in the ECT, and they can change their regulatory framework to comply with the goals of the Paris Agreement. As it was mentioned above, it is probable that the new regulation policies might affect existing investments from nationals of contracting parties to the ECT and this might lead to disputes before investment tribunals.

First, EU Member States and the EU can raise, the procedural objection that the investment tribunals lack jurisdiction based on the *Komstroy* decision. Such procedural objection is obviously relevant to the intra-EU disputes. In addition, EU Member States and the EU can raise substantive objections, based on their obligations deriving from the Paris Agreement. Such substantive objections can be raised, *erga omnes*, not only at intra-EU level.

6.1.1. Procedural objections

The jurisdiction of the investment tribunals is specifically based on the ECT provisions. The investment tribunals have the *kompetenz-kompetenz* to decide as to the extent of their own competence on a dispute before them. Article 26 of the ECT is the basis for the jurisdiction of an investment tribunal, which for instance defines that the investment tribunal has jurisdiction for 'disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former' only if the dispute concerns an alleged breach of an obligation of the Contracting Party and host state of the investment under Part III of the ECT.²³³

Based on the *Komstroy* judgment, it is possible to argue the offer from EU Member States to arbitrate under the ECT at intra-EU level is not valid, and hence the investment tribunals have no jurisdiction.

²³⁰ According to the data of the Energy Charter Secretariat, 135 investment arbitration cases invoked the ECT and it is possible that some cases have been kept secret as the parties in a dispute do not have the obligation to report the case. For more details, see <https://www.energychartertreaty.org/cases/list-of-cases/> and for the list of cases up to January 2021 see https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Statistics/Chart_ECT_cases_-_15_January_2021.pdf (last date accessed 31 August 2021).

²³¹ The Energy Charter Treaty (ECT) Remains the Most Frequently Invoked IIA (11 January 2019) available at <https://www.energycharter.org/media/news/article/the-energy-charter-treaty-ect-remains-the-most-frequently-invoked-ii> (last date accessed 31 August 2021).

²³² See https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Statistics/Chart_ECT_cases_-_15_January_2021.pdf (last date accessed 31 August 2021).

²³³ Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 26(1).

To evaluate the prospect of success of a procedural objection, suffice to mention two recent decisions from Investment Tribunals, *Eskosol*²³⁴ and in *Addiko Bank v Croatia*.²³⁵ In both cases the procedural objection based on the *Achmea* decision was raised, and was rejected. In the former case, which was in relation to the ECT, the procedural objection based on the *Achmea* decision was emphatically rejected as the Investment Tribunal held that: '[t]his provision [Article 26 of the VCLT], a codification of the customary international law principle *pacta sunt servanda*, implies that a judgment of the CJEU cannot by itself put an end to the ECT, or even to one of its articles. For that purpose, certain procedures have to be followed by States wishing to invalidate provisions, whether on the basis of a CJEU judgment that the ECT should be considered incompatible with EU law, or on any other basis.'²³⁶

In the latter case, *Addiko Bank v Croatia*, the procedural objection based on the *Achmea* decision was also rejected despite the fact that the relevant BIT included a conflict provision recognizing the primacy of EU *acquis*.²³⁷ In this dispute, the investment tribunal did not accept the procedural jurisdiction based on *Achmea*, because *Achmea* judgment should not have retroactive effect. In particular, the Investment Tribunal stated that 'the Tribunal is unable to accept that, whatever EU law may provide regarding the *ex tunc* or *ex nunc* effect of the *Achmea* Judgment' and it established its jurisdiction because the consent to arbitration was given before the *Achmea* Judgment.²³⁸

Unless, Investment Tribunals find more creative reasons to uphold their jurisdiction, *Addiko Bank v Croatia* decision implies that the procedural objection of *Achmea* and *Komstroy* will have more chances of success *ex nunc*, for future disputes. However, the ruling in *Addiko Bank v Croatia* does not create a binding precedent for future investment tribunals.

Obviously, investment tribunals' judgments are not binding to future disputes before investment tribunals. However, it is possible for investment tribunals to reject the *Komstroy* procedural objection as they did with the *Achmea* procedural objection.

Furthermore, another provision of the ECT which is relevant to the jurisdiction of an investment tribunal is Article 16.²³⁹ According to Article 16 paragraph 1 of the ECT, an investment tribunal shall not have jurisdiction if the Contracting Parties to the ECT have entered into an international agreement, prior or subsequent with provisions more favorable to the Investor or Investment.

It is possible to argue that the EU legal framework offers a more complete and favorable regime for investors and investments, and thus the EU Court system shall have the jurisdiction to solve the disputes and not the investment tribunals. Against this argument, suffice to quote the investment tribunal in *Eskosol*, which stated that "it is therefore entirely logical to read the provision as allowing the investor itself to make the choice, in any particular circumstance, as to which treaty's dispute resolution mechanism it prefers to invoke."²⁴⁰ However, such strategic forum shopping may raise legitimacy questions in relation to the judgments delivered by investment tribunals. In addition, another investment tribunal in the case *Vattenfall v Germany* hold that 'granting the possibility to

²³⁴ *Eskosol SPA in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Jurisdiction, 7 May 2019.

²³⁵ *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37.

²³⁶ *Eskosol SPA in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Jurisdiction, 7 May 2019. [188].

²³⁷ 'The Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal *acquis* of the European Union (EU) in force at any given time.' See BIT between Croatia and Austria 1997.

²³⁸ *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37 [280].

²³⁹ Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 16.

²⁴⁰ *Eskosol SPA in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Jurisdiction, 7 May 2019. [101].

pursue arbitration, would be understood as “more favourable to the Investor”, insofar as the EU Treaties are interpreted to prohibit that avenue of dispute resolution’.²⁴¹

6.1.2. Substantive objections

Substantive objections depend on the facts of each dispute. In relation to the Paris Agreement, it is possible to argue along the lines that the ECT contains in the preamble an interpretation principle granting priority to the Paris Agreement enacted under the auspices of the United Nations Framework Convention on Climate Change. Alternatively, it is possible to argue that there is a normative conflict between the ECT and the Paris Agreement, and therefore the latter treaty as *lex posterior* shall prevail. In fact, Article 26 paragraph 6 of the ECT instructs investment tribunals to resolve the dispute by applying relevant rules and principles of international law.²⁴² In relation to this argument, it is anyone’s guess whether or not, that the investment tribunals would find that there is a normative conflict between the ECT and the Paris Agreement, and second that the Paris Agreement prevails. However, in both decisions mentioned above, *Eskosol* and in *Addiko Bank v Croatia*, it is noteworthy that the investment tribunals rejected claims that the EU Treaties and BIT regulated the same subject matter, thus the normative conflict between the EU Treaties and BIT was avoided. Such stance from the investment tribunals comes to confirm that in international law normative conflicts between two international treaties are subject to a narrow interpretation.

Having said that, it is possible that investment tribunals take into account the fact that EU Member States did not comply with the ECT obligations (to respect existing investments for instance in relation to fossil fuel) because they addressed ‘imperative goals such as the protection of the environment. Possibly this might lead to an award in favor of the investor, however without compensation, and in the best case scenario it could lead to an award in favor of the host state. Overall, the prospect of adjudication before investment tribunals is not certain and it is possible to expose the Member States of the EU, and the EU into hefty compensations.

6.2. Withdrawal the sooner the better?

The decision of a signatory to the ECT to withdraw (such as the case of Italy, who withdrew in December 2014, and started taking effect since January 2016) makes sense for two reasons:

- First, investments in the energy sector are protected until the date the withdrawal start taking effect, and
- Second, the 20-year sunset clause is activated and the countdown for the protection of investors starts.

In practice, Italy will be free from its responsibilities vis-a-vis the investors in 2036. This signals that **the longer the membership in the ECT lasts, the longer-lasting it appears to be.**

²⁴¹ Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 31 August 2018 [194].

²⁴² Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 26 para 6. A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

However, given that the ECT has already been in force for more than two decades, in combination with the long 20- year sunset clause before any decision to unilaterally withdraw and to be confined into the 20-year period, the alternatives should be carefully examined.

One of these alternatives include efforts to mutually terminate the ECT with or without a successive treaty, such an option being optimum. This option will terminate the ECT for every party involved, including for the investments already made, and will create space for an up-to-date treaty in the energy sector to emerge. Nonetheless, such an option requires consensus from every Contracting Party.

Furthermore, another alternative is to follow the amendment procedure of the ECT, and either limit the duration and even repeal the sunset clauses if possible, or amend the substantive provisions of the ECT to make them more compatible with the Paris Agreement. However, the amendment procedure of the ECT is subject to a very rigid procedure requiring unanimity of the Parties of the ECT.

In the case that consensus to amend or terminate the ECT is not foreseeable, the alternative would be to mitigate the impact of the ECT by modifying the sunset clause among certain Parties to the ECT. Namely, the EU Member States and the EU, and have each of them unilaterally withdraw. According to this option, the treaty would be terminated, and the sunset clause would expire in advance only among the EU Member States and the EU. However, for the remaining Parties to the ECT, both sectional sunset clauses would be activated.

The following parts will examine with more detail the option to terminate the ECT, with or without a new Treaty. Then they will review the amendment of changing the duration of the sunset clause to a shorter duration, or whether or not the multilateral agreement to repeal the sunset clause altogether should occur. Alternatively, the option to amend the content of the ECT and its substantive provisions, by adding escape clauses would be discussed. Finally, this chapter will conclude with the modification of the ECT sunset clause only for certain Parties and then as follows their withdrawal from it.

6.3. The in-advance expiration of the ECT

6.3.1. The termination of the ECT

Once a sunset clause is attached to law, such law is considered to have a limited duration, however, its duration is not set in stone. In a plethora of cases, lawmakers have terminated or revoked a law that was subject to a sunset clause. So when lawmakers invalidate laws before their automatic expiration due to the sunset clause, in reality, they are expiring such laws in advance before the sunset clause.²⁴³

In the international law ecosystem, Parties to bilateral or multilateral treaties, which are subject to sunset clauses may always terminate such treaties in advance, before their automatic expiration, as long as there is mutual consent. The VCLT, on the matter, codifies customary law and prescribes that for the termination of a treaty, the consent of all Parties is necessary unless the Treaty at stake has a more specific provision.²⁴⁴

²⁴³ On the issue of in advance expiration of treaties subject to sunset clause, see above Part 4.3.

²⁴⁴ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 53.

Since the ECT does not include any provision regulating the termination of the treaty, then the consent of the Parties is necessary.²⁴⁵ As it was mentioned above in Part 4.1.1 the mutual termination of a treaty has an immediate effect, and unless otherwise agreed by all of the Parties, such mutual termination does not activate the sunset clause. The activation of a sunset clause, as is the case of the ECT, takes place only in the case of unilateral withdrawal.²⁴⁶

For more clarity, and to avoid interpretation conflicts, the Parties may consent to terminate the ECT and explicitly remove the protective effect of the sunset clause in their termination agreement.²⁴⁷ Hence, the termination of the ECT will be immediate and complete.

6.3.2. Termination of the ECT with the adoption of a new Energy Treaty

Another way to achieve the goal of termination of the ECT is through the conclusion of a later treaty. According to Article 59 of the VCLT, all Parties can terminate a treaty, if a later treaty with the same subject matter is concluded by them.²⁴⁸ In doing so, either the intention of all Parties to terminate the old treaty must be clear, for example by stating in the later treaty that the previous treaty has been terminated, or that the provisions of the later treaty are so far incompatible with those of the earlier one.²⁴⁹

To exemplify this, when Australia and Hong Kong replaced their BIT of 1993 with a new Investment Agreement in 2019 they made the following configuration: In Article 40 paragraph 2 of the later treaty, they regulated the relationship between the old BIT and the new Agreement and explicitly referred to the 15-year sunset clause in the terminated BIT. In particular, the new provision prescribed that 'The Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments, done at Hong Kong on September 15, 1993 (IPPA) shall

²⁴⁵ Had the ECT been subject to an unconditional sunset clause like the 50-year sunset clause of the ECSC, the termination would have been a more straightforward process.

²⁴⁶ However, Voon, Mitchell, and Munro suggest that 'in terminating the treaty by consent, the Parties would need to expressly indicate that the [sunset] clause and any rights and obligations conferred by it are extinguished'. Tania Voon, Andrew Mitchell, James Munro, *Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights* (2014) 29 ICSID Review 451, 454. Thus there is a need for an express reference to the extinction of the sunset clause. Their argument is based on Article 70 of the VCLT, which provides that the termination 'does not affect any right . . . created through the execution of the treaty prior to its termination'. See United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 70. However, the ICJ in the case *Northern Cameroons* set out the consequences of termination of the Trusteeship Agreement stating that: 'Looking at the situation brought about by the termination of the Trusteeship Agreement from the point of view of a Member of the United Nations, other than the Administering Authority itself, it is clear that any rights which may have been granted by the Articles of the Trusteeship Agreement to other Members of the United Nations or their nationals came to an end. This is not to say that, for example, property rights that might have been obtained in accordance with certain Articles of the Trusteeship Agreement and which might have vested before the termination of the Agreement, would have been divested by the termination.' See ICJ *Northern Cameroons (Cameroon v United Kingdom) (Preliminary Objections)* [1963] ICJ Rep 15, 34. Accordingly, awards delivered, or jurisdiction already established cannot be affected by the termination. But the termination does not allow prospective disputes, as the treaty altogether is terminated including the provision of the sunset clause.

²⁴⁷ See James Harrison, 'The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties' (2012) 13 *Journal World Investment and Trade* 928, 942–7; Tania Voon, Andrew Mitchell and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29(2) ICSID Review 451.

²⁴⁸ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 59. See also Anthony Aust, *Modern Treaty Law and Practice* (CUP, 2007, 2nd ed.) 292.

²⁴⁹ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 59.1(a) and 1(b). See also Anthony Aust, *Modern Treaty Law and Practice* (CUP, 2007, 2nd ed.) 292.

terminate on the date of entry into force of this Agreement. From that date, all provisions of the IPPA, including the provisions for termination contained in Article 14 (Entry into Force and Duration and Termination), and any rights or obligations arising from those provisions, shall cease to have effect.²⁵⁰

In like manner, when Australia and Uruguay replaced their BIT of 2001 with a new one in 2019, they referred to the legal effect of the termination of the BIT of 2001 for greater certainty. In particular, Article 17 of the BIT of 2019 provides that 'The Parties agree that the "Agreement between Australia and Uruguay on the Promotion and Protection of Investments", signed at Punta del Este on 3 September 2001 (hereafter the "IPPA"), will terminate on the date of entry into force of this Agreement. For greater certainty, the agreement of the Parties to terminate the IPPA in paragraph 5 shall, on the date of entry into force of this Agreement, supersede the provisions for termination contained in Article 15 (Entry into force, duration and termination) of the IPPA.'²⁵¹

6.4. The revision of the ECT

While the ECT has no provision regulating its termination, it has a special provision about its amendment.²⁵² Article 42 of the ECT prescribes that '[...] Instruments of ratification, acceptance or approval of amendments to this Treaty shall be deposited with the Depositary. Amendments shall enter into force between Contracting Parties having ratified, accepted, or approved them on the ninetieth day after deposit with the Depositary of instruments of ratification, acceptance, or approval by at least three-fourths of the Contracting Parties. Thereafter the amendments shall enter into force for any other Contracting Party on the ninetieth day after that Contracting Party deposits its instrument of ratification, acceptance, or approval of the amendments.'

The decision though for the approval of an amendment to the ECT requires, in principle, unanimity of the present parties at the meeting of the Charter Conference according to Article 36 of the ECT.²⁵³ Then for the entry into force, the supermajority of $\frac{3}{4}$ is required. **Such conditions, in practice, make the amendment process of the ECT, a rigid procedure.**

6.4.1. Agreement to amend the duration of the sunset clause

The amendment provision of the ECT is in line with the general framework of the VCLT for the amendment of multilateral treaties.²⁵⁴ In particular, the VCLT incorporates the general principle of sovereign voluntarism requiring the consent of the parties.

²⁵⁰ Australia - Hong Kong Investment Agreement (2019) Article 40.2.

²⁵¹ Australia - Uruguay BIT (2019) Article 17 paragraphs 5 and 6.

²⁵² Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 42.4.

²⁵³ Energy Charter Treaty 2080 UNTS 100. ECT 1994, Article 36. 'Unanimity of the Contracting Parties Present and Voting at the meeting of the Charter Conference where such matters fall to be decided shall be required for decisions by the Charter Conference to: (a) adopt amendments to this Treaty other than amendments to Articles 34 and 35 and Annex T;

²⁵⁴ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 40.

In practice, amendments to the ECT are often discussed. For instance, in 2018 a series of topics were selected for the modernization of the Treaty.²⁵⁵ However, the ECT was amended once in 1998.²⁵⁶ Through the amendment process, Parties may propose the amendment of the sunset clause in Article 47 paragraph 3 of the ECT. In particular, the Parties may propose to shorten the duration of the sunset clause from 20 years, to five years or ten years.²⁵⁷

Interestingly, the recent BIT between the EU and Vietnam makes a specific reference to the Contracting Parties option to amend the sunset clause and possibly increase and decrease the duration of the 15-year sunset clause or even repeal it. In particular, Article 4.15 provides that 'In the event that this Agreement is terminated pursuant to Article 4.10 (Duration), the provisions of Chapter 1 (Objectives and General Definitions), Articles 2.1 (Scope), 2.2 (Investment and Regulatory Measures and Objectives) and 2.5 (Treatment of Investment) to 2.9 (Subrogation), the relevant provisions of Chapter 4 and the provisions of Section B (Resolution of Disputes between Investors and Parties) of Chapter 3 (Resolution of Disputes between Investors and Parties) shall continue to be effective for a further period of 15 years from the date of termination, with respect to investments made before the date of termination of the present Agreement, *unless the Parties agree otherwise...*'²⁵⁸

In like manner, Model BITs such as the Slovakia Model BIT of 2019 or the Russian Federation Model BIT of 2016 also make a specific reference to the Contracting Parties option to amend the sunset clause. For instance, the Model Treaty of Slovakia in Article 28 paragraph 3 states that 'In respect of investments made prior to the date of the termination of this Agreement the provisions of this Articles 1 to 28 of this Agreement shall continue to be effective for a period of five (5) years from the date of its termination, *unless the Contracting Parties agree otherwise*'.²⁵⁹

In practice, when Australia and Chile terminated their Investment Promotion and Protection Agreement (IPPA) and replaced it with a free trade agreement, they amended the former treaty's sunset clause. The sunset clause according to the IPPA had a duration of 15 years,²⁶⁰ and with the FTA the duration was shortened to three years.²⁶¹ In like manner, CETA, which is a trade agreement between the EU and Canada replaced a number of BITs between Canada and EU Member States and respectively

²⁵⁵ See 'Approved topics for the modernisation of the Energy Charter Treaty' (29 November 2018) available at <https://energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty> (last date accessed August 25 2021).

²⁵⁶ The trade-related provisions of the Energy Charter Treaty were amended to comply with the WTO. See 'The Amendment to the Trade-related Provisions of the Energy Charter Treaty' available at <https://www.energycharter.org/process/energy-charter-treaty-1994/trade-amendment/> (last date accessed August 25 2021)

²⁵⁷ According to an OECD report, in a sample of 2061 International Investment Agreements, the average duration of sunset clauses in was 12.5 years, while about half of them had duration of 10 years. See Joachim Pohl, 'Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions' OECD Working Papers on International Investment, 2013/04 [Figure 5].

²⁵⁸ EU-Vietnam Investment Protection Agreement (30 June 2019) Article 4.15.

²⁵⁹ Slovakia Model BIT 2019, Article 28 paragraph 3 available at <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements> (last date accessed August 25 2021). The same construction is recorded in the Russian Federation Model BIT 2016 see Article 77.

²⁶⁰ Australia-Chile Agreement on the Reciprocal Promotion and Protection of Investments (1999), Article 11.

²⁶¹ See for instance the Australia-Chile Free Trade Agreement, Annex 10-E, para. 3. 'Notwithstanding paragraph 2, an investor may only submit a claim under Article 11 of the IPPA (Settlement of disputes between a Contracting Party and an investor of the other Contracting Party) within three years from the date of entry into force of this Agreement.'

reduced the duration of the sunset clauses in the BITs. To exemplify this, the 20-year sunset clause in the BIT between Canada and Poland²⁶² was reduced to three-years according to the CETA.²⁶³

Finally, an alternative would be to partially amend the sunset clause. For example, the EU has submitted a proposal to limit the duration of the sunset clause up to ten years (after entry into force of the amendment) only for existing fossil fuel investments.²⁶⁴ This proposal does not affect the sunset clauses in relation to green energy, and possibly has more chances to receive more consensus among the parties of the ECT.

6.4.2. Agreement to amend the substantive content of the ECT

As it was mentioned above, the special protection dedicated to investments, which generate duties to host states is the core part of the provisions of the ECT, while the sunset clause simply sets up the duration of the validity of such rules.²⁶⁵

That said, instead of amending the sunset clause, the alternative option would be to amend the substantive provisions (primary legal rules) of the ECT, which protect equally, as an example investments in fossil fuel and renewable energy. In that sense, the ECT would become a treaty more compatible with the goals of the Paris Agreement, and investments in renewable energy will continue to receive a high level of protection due to the ECT.

However, both options to amend either the sunset clause provision itself and the substantive provisions of the ECT, especially the provisions in relation to the investment arbitration, are subject to a very rigid amendment process.

6.5. The *ultimum refugium* of the modification of the ECT among the Member States of the EU and then termination

Negotiations to amend a multilateral agreement is technically more difficult than with bilateral treaties. Aust identifies three basic problems: 1) amendment process can be as difficult as bringing into force the original treaty, 2) even more troublesome the long life of multilateral treaties implies that there would definitely be a need for amendment, and 3) the amendment procedures are generally inadequate, leading to amendments that do not bind all the parties.²⁶⁶

In case of making amendment proposals that allow the ECT to be more compatible with the goals of the Paris Agreement, without the required consensus from the other Parties, the *ultimum refugium* would be the modification or the mutual termination of the ECT only among the EU Member States.

²⁶² Agreement between the Government of Canada and the Government of the Republic of Poland for the Promotion and Reciprocal Protection of Investments E101511 - CTS 1990 No. 43, Article 14.

²⁶³ Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part OJ L 11, 14.1.2017, p. 23–1079, Article 30.8 paragraph 2.

²⁶⁴ EU Commission. (2021, January 25). EU text proposal for the modernisation of the Energy Charter Treaty. https://trade.ec.europa.eu/doclib/docs/2021/february/tradoc_159436.pdf (last date accessed August 25 2021).

²⁶⁵ On the nature of the sunset clauses are secondary rules see the discussion above at Part 1.3.

²⁶⁶ See Anthony Aust, *Modern Treaty Law and Practice* (CUP, 2007, 2nd ed.) 262.

The ECT is silent on the issue of the modification only between certain parties. Hence, Article 41 of the VCLT, which regulates this topic, offers guidance.²⁶⁷ Given that the ECT has no provision regulating its modification,²⁶⁸ nor it is prohibited²⁶⁹ a proposal to modify the ECT only for certain of the parties must comply with two conditions: first whether a proposal to amend the ECT would affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;²⁷⁰ and second whether or not such proposal would be incompatible with the effective execution of the object and purpose of the ECT as a whole.²⁷¹

In practice, the aforementioned conditions substantially restrict the content of any proposal to modify the ECT only for certain parties. Theoretically speaking, **a proposal to limit the duration of the sunset clause, or the removal of the sunset clause would not affect either the enjoyment by the other parties of their rights under the treaty and would not be incompatible with the effective execution of the object and purpose of the ECT as a whole.** Obviously, the scope of such modification will affect only the parties, which will ratify such modification, namely the Member States of the EU and the EU. Then these Parties may withdraw, and investors in the energy sector with claims against these 'ex Parties' to the ECT may bring claims before national and EU courts. However, the Treaty protection for investments already made will endure for the remaining parties to the ECT according to the 20-year sunset clause.

This recommendation comes with a caveat. Investments already made and which are originally from EU companies, may have structured their investments through subsidiaries, and hence receive protection based on different nationalities, falling back in the treaty coverage.²⁷² However, the strategic restructuring to circumvent the nationality precondition is not permitted. A number of tribunals have dismissed cases recognizing abuse of process in case the restructuring had the principal aim of bringing an investment claim.²⁷³

6.6. Concluding remarks

The drafting of laws, treaties, and constitutions is a very delicate exercise. Rules drafted today remain in force for an indefinite period and it is impossible to foresee every eventuality. In relation to the drafting of sunset clauses, whilst they are frequently used, their legal effect is understudied. This is not unique for sunset clauses. In general, there is a paucity of research in relation to procedural rules, such as the final provisions in treaties.

²⁶⁷ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 41.

²⁶⁸ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 41, paragraph 1 (a).

²⁶⁹ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 41, paragraph 1 (b).

²⁷⁰ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 41, paragraph 1 (b) (i).

²⁷¹ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, Article 41, paragraph 1 (b) (ii).

²⁷² On this matter, see *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009 [24 – 28].

²⁷³ For more details, see Emmanuel Gaillard, *Abuse of Process in International Arbitration* (2017) 32 ICSID Review 17.

The ECT has a unique entrenchment effect limiting policymakers and lawmakers at national and EU level. What makes the ECT a distinct case is the combination of different features. Apart from the 20-year sunset clause, ECT is a multilateral treaty and by default, multilateral treaties are more difficult to amend. On top of that, the amendment procedure is a very rigid process requiring unanimity. Hence, the entrenchment effect of the ECT and the limits imposed on the agenda of policymakers at EU level is unparalleled.

Based on the case of the sunset clauses in the ECT and their entrenchment effect, unless the drafters of a legal document intend a legal framework that enhances stability over flexibility, it is advised to avoid sunset clauses with long duration in combination with other entrenchment mechanisms such as initial validity periods, restrictions in the withdrawal process, and rigid amendment processes.

All in all, the solution of the modification or the mutual termination of the ECT only among the EU Member States would have more immediate and certain effects.

REFERENCES

- Aust A, *Modern Treaty Law and Practice* (CUP, 2007, 2nd ed.)
- Aust A, 'Treaties, Termination' in Anne Peters and Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2012) available at www.mpepil.com
- Bennion FAR, *Bennion on Statutory Interpretation* (5th edn, Lexis Nexis 2008)
- Craig P and de Búrca G, *EU Law Text, Cases, and Materials* (OUP, 2020,)
- de Cossio FG, 'Investment Protection Rights: Substantive or Procedural?' (2011) 26 *ICSID Review* 107
- Dean D, *Law-making and Society in Late Elizabethan England* (CUP 1996)
- Depledge J, *Foundations for the Paris Agreement*, in Daniel Klein, María Pía Carazo, Meinhard Doelle, Jane Bulmer, Andrew Higham, *The Paris Agreement on Climate Change: Analysis and Commentary* (OUP 2017)
- Fisher AS, 'Arms Control and Disarmament in International Law' (1964) 50 *Virginia Law Review* 1200
- Fry JD and Repousis OG, 'Intertemporality and international investment arbitration: protecting the jurisdiction of established tribunals' (2015) 31 *Arbitration International* 213
- Gaillard E, 'The Denunciation of the ICSID Convention' (26 June 2007) *New York Law Journal* 1
- Gaillard E, *Abuse of Process in International Arbitration* (2017) 32 *ICSID Review* 17
- Giegerich T, 'Article 56. Denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012)
- Gordon K and Pohl J, *Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World*, OECD Working Papers on International Investment 19 (OECD Publishing)
- Harrison J, *The Life and Death of BITs: Legal Issues Concerning Survival Clauses and the Termination of Investment Treaties* (2012) 13 *The Journal of World Investment & Trade* 928
- Hart HLA, *The Concept of Law* (Paul Craig ed, 3rd edn, OUP 2012)
- Herbert Broom, *Legal Maxims* (T & JW Johnson Law Booksellers 1845)
- Ilbert C, *Legislative Methods and Forms* (Clarendon Press 1901)
- Jandhyala S, Henisz WJ and Mansfield ED, 'Three Waves of BITs: The Global Diffusion of Foreign Investment Policy' (2011) 55 *The Journal of Conflict Resolution*. 1047
- Jenks CW, 'The Conflict of Law-Making Treaties' (1953) 30 *British Yearbook of International Law* 401
- Kelley G, 'Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations' (2001) 39 *Columbia Journal Transnational Law* 483
- Kelsen H, 'Sovereignty and International Law' (1960) 48 *Georgetown Law Journal* 627

- Kikarea E, *Brexit and Preferential Trade Agreements: Issues of Termination and Survival Clauses* (2019) 46 *Legal Issues of Economic Integration* 53
- Kouroutakis A, *The Constitutional Value of Sunset Clauses* (Routledge 2017)
- Leal-Arcas R, *Commentary on the Energy Charter Treaty* (Edward Elgar 2018)
- Marceau G, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties', (2001) 35 *Journal of World Trade* 1081
- Matz-Lück N, 'Conflicts between Treaties' in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2012) available at www.mpepil.com
- McKelvey RD, 'Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control' (1976) 12 *Journal of Economic Theory* 472
- Nyombi C, and Mortimer T, 'Rights and Obligations in the Post Investment Treaty Denunciation Period' (2018) 21 *International Arbitration Law Review* 46
- Odendahl K, 'Article 30. Application of successive treaties relating to the same subject matter' in Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012)
- Oppenheim L, *International Law: A Treatise* (2nd edn, Longmans, Green & Co 1912) vol 1
- Peinhardt C and Wellhausen RL, *Withdrawing from Investment Treaties but Protecting Investment* (2016) 7 *Global Policy* 571
- Pohl J, 'Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions' OECD Working Papers on International Investment, 2013/04, 19
- Roberts A, 'Triangular treaties: the nature and limits of investment treaty rights' (2015) 56 *Harvard International Law Journal* 353
- Salacuse JW, *The Law of Investment Treaties*' (OUP 3rd edition)
- Seyed-Ali S-A *Methods of Resolving Conflicts between Treaties. Graduate Institute of International Studies* (Brill Academic Publishers, 2003)
- Schreuer CH., Malintoppi L, Reinisch A, Sinclair A, *The ICSID Convention: A Commentary* (CUP 2009)
- Schrijver N, 'The Changing Nature of State Sovereignty' (1999) 70 *British Yearbook of International Law* 65.
- Sornarajah M, *The International Law on Foreign Investment* (CUP 2021 5th ed)
- Spears SA, 'The Quest for Policy Space in a New Generation of International Investment Agreements, (2010) 13 *Journal of International Economic Law* 1037
- Sussman E, 'The Energy Charter Treaty's Investor Protection Provisions: Potential to Foster Solutions to Global Warming and Promote Sustainable Development' (2007) 14 *ILSA Journal of International & Comparative Law* 391
- Tienhaara K and Cotula L, *Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets* (IIED 2020)
- Tladi D, 'First report on jus cogens by the ILC Special Rapporteur' (8 March 2016) A/CN.4/693; Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006).

- Titi C, Most-Favoured-Nation Treatment: Survival Clauses and Reform of International Investment Law (2016) 33 *Journal of International Arbitration* 425;
- van Aaken A, International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis (2009) 12 *Journal of International Economic Law* 507
- Villiger ME, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009)
- Vranes E, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17
- Voon T and Mitchell AD, Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law (2016) 31 *ICSID Review* 413
- Voon T, Mitchell A, Munro J, Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) 29 *ICSID Review* 451
- Weatherall T, *Jus Cogens: International Law and Social Contract* (CUP 2015)
- Wolfram K, 'Conflicts Between Treaties' in R. Bernhardt (ed.), *Encyclopedia of Public International Law* (1984)
- Wolfrum R and Matz N, *Conflicts in International Environmental Law* (Springer, 2003)
- Xanthaki H, 'Sunset Clauses: A Contribution to Legislative Quality' in Sofia Ranchordás and Yaniv Rosnai, *Time, Law, and Change An Interdisciplinary Study* (Hart 2020)
- Report of the International Law Commission, Chapter VIII: Peremptory norms of general international law (jus cogens) in 'Interim Report Drafting Committee 2018' (A/73/10)
- Report of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (A/CN.4/L.682)
- Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law' (2006) 2 *Yearbook of the International Law Commission* 175
- *The Book of Jargon, International Arbitration* (Latham & Watkins, 2020)

APPENDIX

Energy Charter Treaty

Preamble

The Contracting Parties to this Treaty, (...) Recalling the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects;

Article 16 Relation to other Agreements

Where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern the subject matter of Part III or V of this Treaty, (1) nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; and (2) nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favourable to the Investor or Investment

Article 26 Settlement of Disputes between an Investor and a Contracting Party

(1) Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.

(2) If such disputes can not be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: (a) to the courts or administrative tribunals of the Contracting Party party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) in accordance with the following paragraphs of this article.

(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article. (b)(i) The Contracting Parties listed in Annex ID do not give such unconditional consent where the Investor has previously submitted the dispute under subparagraph (2)(a) or (b). (ii) For the sake of transparency, each Contracting Party that is listed in Annex ID shall provide a written statement of its policies, practices and conditions in this regard to the Secretariat no later than the date of the deposit of its instrument of ratification, acceptance or approval in accordance with Article 39 or the deposit of its instrument of accession in accordance with Article 41. (c) A Contracting Party listed in Annex IA does not give such unconditional consent with respect to a dispute arising under the last sentence of Article 10(1).

(4) In the event that an Investor chooses to submit the dispute for resolution under subparagraph (2)(c), the Investor shall further provide its consent in writing for the dispute to be submitted to: (a) (i) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington, 18 March 1965 (hereinafter referred to as the "ICSID Convention"), if the Contracting Party of the Investor and the Contracting Party party to the dispute

are both parties to the ICSID Convention; or (ii) The International Centre for Settlement of Investment Disputes, established pursuant to the Convention referred to in subparagraph (a)(i), under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (hereinafter referred to as the "Additional Facility Rules"), if the Contracting Party of the Investor or the Contracting Party party to the dispute, but not both, is a party to the ICSID Convention; (b) a sole arbitrator or ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter referred to as "UNCITRAL"); or (c) an arbitral proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce.

(5) (a) The consent given in paragraph (3) together with the written consent of the Investor given pursuant to paragraph (4) shall be considered to satisfy the requirement for: (i) written consent of the parties to a dispute for purposes of Chapter II of the ICSID Convention and for purposes of the Additional Facility Rules; (ii) an "agreement in writing" for purposes of Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958 (hereinafter referred to as the "New York Convention"); and (iii) "the parties to a contract [to] have agreed in writing" for the purposes of Article 1 of the UNCITRAL Arbitration Rules. (b) Any arbitration under this article shall at the request of any party to the dispute be held in a state that is a party to the New York Convention. Claims submitted to arbitration hereunder shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of that Convention.

(6) A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

(7) An Investor other than a natural person which has the nationality of a Contracting Party party to the dispute on the date of the consent in writing referred to in paragraph (4) and which, before a dispute between it and that Contracting Party arises, is controlled by Investors of another Contracting Party, shall for the purpose of Article 25(2)(b) of the ICSID Convention be treated as a "national of another Contracting State" and shall for the purpose of Article 1(6) of the Additional Facility Rules be treated as a "national of another State".

(8) The awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute. An award of arbitration concerning a measure of a subnational government or authority of the disputing Contracting Party shall provide that the Contracting Party may pay monetary damages in lieu of any other remedy granted. Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards.

Article 47: Withdrawal

(1) At any time after five years from the date on which this Treaty has entered into force for a Contracting Party, that Contracting Party may give written notification to the Depositary of its withdrawal from the Treaty.

(2) Any such withdrawal shall take effect upon the expiry of one year after the date of the receipt of the notification by the Depositary, or on such later date as may be specified in the notification of withdrawal.

(3) 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.

(4) All Protocols to which a Contracting Party is party shall cease to be in force for that Contracting Party on the effective date of its withdrawal from this Treaty.

Vienna Convention of the Law of the Treaties

Article 30 - Application of successive treaties relating to the same subject-matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.

2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

5. Paragraph 4 is without prejudice to Article 41, or to any question of the termination or suspension of the operation of a treaty under Article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.

Article 31 - General rule of interpretation

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Treaty on the Functioning of the European Union

Article 267 (ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 344 (ex Article 292 TEC)

Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.

Paris Agreement

Article 2

1. This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and (c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. 2. This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

Article 3

As nationally determined contributions to the global response to climate change, all Parties are to undertake and communicate ambitious efforts as defined in Articles 4, 7, 9, 10, 11 and 13 with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement.

Article 4

1. In order to achieve the long-term temperature goal set out in Article 2, Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.

3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

4. Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.

5. Support shall be provided to developing country Parties for the implementation of this article, in accordance with Articles 9, 10 and 11, recognizing that enhanced support for developing country Parties will allow for higher ambition in their actions.

6. The least developed countries and small island developing States may prepare and communicate strategies, plans and actions for low greenhouse gas emissions development reflecting their special circumstances.

7. Mitigation co-benefits resulting from Parties' adaptation actions and/or economic diversification plans can contribute to mitigation outcomes under this article.

8. In communicating their nationally determined contributions, all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement.

9. Each Party shall communicate a nationally determined contribution every five years in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement and be informed by the outcomes of the global stocktake referred to in Article 14.

10. The Conference of the Parties serving as the meeting of the Parties to this Agreement shall consider common time frames for nationally determined contributions at its first session.

11. A Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

12. Nationally determined contributions communicated by Parties shall be recorded in a public registry maintained by the secretariat.

13. Parties shall account for their nationally determined contributions. In accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

14. In the context of their nationally determined contributions, when recognizing and implementing mitigation actions with respect to anthropogenic emissions and removals, Parties should take into account, as appropriate, existing methods and guidance under the Convention, in the light of the provisions of paragraph 13 of this article.

15. Parties shall take into consideration in the implementation of this Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties.

16. Parties, including regional economic integration organizations and their member States, that have reached an agreement to act jointly under paragraph 2 of this article shall notify the secretariat of the terms of that agreement, including the emission level allocated to each Party within the relevant time period, when they communicate their nationally determined contributions. The secretariat shall in turn inform the Parties and signatories to the Convention of the terms of that agreement.

17. Each party to such an agreement shall be responsible for its emission level as set out in the agreement referred to in paragraph 16 of this article in accordance with paragraphs 13 and 14 of this article and Articles 13 and 15.

18. If Parties acting jointly do so in the framework of, and together with, a regional economic integration organization which is itself a Party to this Agreement, each member State of that regional economic integration organization individually, and together with the regional economic integration organization, shall be responsible for its emission level as set out in the agreement communicated under paragraph 16 of this article in accordance with paragraphs 13 and 14 of this article and Articles 13 and 15.

19. All Parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies, mindful of Article 2 taking into account their common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.

Sunset clauses in International Treaties account for numerous benefits. However, their entrenchment effect disproportionately burdens future policymakers.

This is the case of the Energy Charter Treaty, which poses unique challenges for two main reasons. First, compared to other treaties, the ECT contains a 20-year sunset clause. Second, the treaty is a multilateral with a rigid amendment procedure, which empowers the entrenchment effect of that treaty.

Within this context, the study explores the policy options to disengage from the ECT and the entrenchment effect of its sunset clauses.

PE 703.592

IP-C-JURI-IC-2021-049

Print ISBN 978-92-846-8815-9

| doi: 10.2861/201018

| QA-03-21-494-EN-C

PDF ISBN 978-92-846-8814-2

| doi: 10.2861/68288

| QA-03-21-494-EN-N