



# Columbia Center on Sustainable Investment

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## Should the European Union Fix, Leave or Kill the Energy Charter Treaty?

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### The EU started it

In the early 1990s, the European Economic Community—the predecessor of the European Union (EU)—spearheaded an initiative to promote international cooperation in the energy sector, particularly with post-Soviet States in Eastern Europe and Central Asia. Out of this process the Energy Charter Treaty (ECT) was born in 1994. Going much beyond international cooperation, the treaty allows foreign investors in the energy sector to sue their host States in international arbitral tribunals and claim monetary compensation when policy measures and other State action affect their interests.

Fast-forward to 2021. With 135 known cases initiated to date,<sup>1</sup> the ECT's is the most frequently invoked treaty-based investor–State dispute settlement (ISDS) mechanism.<sup>2</sup> As evidenced by a growing body of research, the ECT is obsolete considering not only modern tenets of international investment law, but also the objectives of the Paris Agreement on Climate Change and the Sustainable Development Goals (SDGs), both global texts 21 years younger.<sup>3</sup> The special protections under international law that the ECT gives to fossil fuel investors and their investments go in the opposite direction of what is needed for the world to decarbonize its energy matrix and fight the climate emergency.<sup>4</sup>

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<sup>1</sup> “List of Cases,” International Energy Charter (website), Energy Charter Secretariat, accessed February 12, 2021, <https://www.energychartertreaty.org/cases/list-of-cases>.

<sup>2</sup> “Investment Dispute Settlement Navigator,” Investment Policy Hub (website), United Nations Conference on Trade and Development (UNCTAD), accessed February 12, 2021, <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

<sup>3</sup> Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, “Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition,” *Transnational Dispute Management* 1 (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3446723](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3446723).

<sup>4</sup> Martin Dietrich Brauch, “Reforming International Investment Law for Climate Change Goals,” in *Research Handbook on Climate Finance and Investment*, eds. Michael Mehling and Harro van Asselt (Cheltenham: Edward Elgar, forthcoming), <https://academiccommons.columbia.edu/doi/10.7916/d8-300v-7h63>; “End Fossil Protection,”

## The EU should address it

Mounting pressure by European civil society has brought to light the ECT's shortcomings and inconsistency with EU policies,<sup>5</sup> calling on the European Commission to take action by seizing the momentum of the ongoing renegotiation—or “modernization”—of the ECT.<sup>6</sup> The first three rounds of renegotiation talks were held in July, September, and November 2020,<sup>7</sup> and the process will continue throughout 2021.<sup>8</sup>

For good reason, the pressure is on the EU. First, the ECT is not in line with EU investment law and policy.<sup>9</sup> The Union now negotiates investment agreements that (imperfect as they still are) provide substantive rights with reform-oriented language,<sup>10</sup> much different from the vaguely worded provisions of the ECT. Investment Court Systems (ICS) with standing courts and appellate bodies now appear in EU investment agreements in lieu of investor–state arbitration provisions such as the one included in the ECT, and the Union intends to create a Multilateral Investment Court to replace ICS.<sup>11</sup> In addition, Belgium requested an opinion from the Court of Justice of the EU (CJEU), which may result in a finding of incompatibility of the ECT's ISDS provisions with EU law.<sup>12</sup> Even though the EU's new approaches fail to meaningfully address the core problems of international investment law,<sup>13</sup> the fact is that the ECT is inconsistent with those new approaches.

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End Fossil Protection (website), End.Fossil.Protection.Org, accessed February 12, 2021, <http://www.endfossilprotection.org>.

- <sup>5</sup> Fabian Flues, Pia Eberhardt, and Cecilia Olivet, *Busting the Myths Around the Energy Charter Treaty: A Guide for Concerned Citizens, Activists, Journalists and Policymakers* (Berlin, Brussels, and Amsterdam: PowerShift, Corporate Europe Observatory, and Transnational Institute, December 2020), [https://www.tni.org/files/publication-downloads/busting\\_the\\_myths\\_around\\_the\\_energy\\_charter\\_treaty\\_web.pdf](https://www.tni.org/files/publication-downloads/busting_the_myths_around_the_energy_charter_treaty_web.pdf).
- <sup>6</sup> Martin Dietrich Brauch, “Modernizing the Energy Charter Treaty: A Make-or-Break Moment for Sustainable, Climate-Friendly Energy Policy,” *International Institute for Sustainable Development (IISD)* (blog), IISD, November 13, 2019, <https://www.iisd.org/articles/modernizing-energy-charter-treaty-make-or-break-moment-sustainable-climate-friendly-energy>.
- <sup>7</sup> “Modernisation of the Treaty,” International Energy Charter (website), Energy Charter Secretariat, accessed February 12, 2021, <https://www.energychartertreaty.org/modernisation-of-the-treaty>.
- <sup>8</sup> Energy Charter Secretariat, Decision of the Energy Charter Conference: Preliminary Draft Schedule of Planned and Proposed Energy Charter Meetings and Activities for 2021, December 16, 2020, <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2020/CCDEC202017.pdf>.
- <sup>9</sup> “Energy Charter Treaty Modernisation: European Commission Presents Draft Negotiating Directives,” European Commission (website), European Commission, May 14, 2019, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2017>.
- <sup>10</sup> UNCTAD, *International Investment Agreements Reform Accelerator* (Geneva: UNCTAD, 2020), [https://unctad.org/system/files/official-document/diaepcbinf2020d8\\_en.pdf](https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf).
- <sup>11</sup> “The Multilateral Investment Court Project,” European Commission (website), European Commission, modified January 2021, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>.
- <sup>12</sup> “Belgium Requests an Opinion on the Intra-European Application of the Arbitration Provisions of the Future Modernised Energy Charter Treaty,” Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation (website), Kingdom of Belgium, Foreign Affairs, Foreign Trade and Development Cooperation, December 3, 2020, [https://diplomatie.belgium.be/en/newsroom/news/2020/belgium\\_requests\\_opinion\\_intra\\_european\\_application\\_arbitration\\_provisions](https://diplomatie.belgium.be/en/newsroom/news/2020/belgium_requests_opinion_intra_european_application_arbitration_provisions).
- <sup>13</sup> “Public Consultation on a Multilateral Reform of Investment Dispute Settlement,” CCSI (website), CCSI, March 13, 2017, <http://ccsi.columbia.edu/2017/03/17/public-consultation-on-a-multilateral-reform-of-investment-dispute-settlement>.

Second, the ECT is not in line with EU climate law and policy.<sup>14</sup> To walk its talk as a climate leader—with its pledge to carbon neutrality by 2050 reflected in the European Green Deal and the European Climate Law—the EU cannot afford to continue to sponsor the ECT, which protects fossil fuel investors and investments. In fact, the European Parliament introduced in the European Climate Law a mandate for the Union to “end the protection of investments in fossil fuels in the context of the modernisation of the Energy Charter Treaty.”<sup>15</sup>

Third, the EU’s intentions in spearheading the ECT may have been the noblest in 1994, but by 2021 standards the treaty is an investment and climate aberration. Having started this mess, the EU has moral responsibility for cleaning it, for the sake of concerned Europeans as well as the decarbonizing world.

Facing the ongoing ECT renegotiation process, the EU can continue working with others to fix the treaty (**amendment**), reform it through an agreement between EU Member States and other like-minded states (**inter se agreement**), leave it (**withdrawal**), or convince all ECT Members that the best solution is to kill it (**termination**). Below I look into each option.

## Should the EU fix it?

The Union itself, 26 of its Member States (all but Italy),<sup>16</sup> and the European Atomic Energy Community (EURATOM)—an independent organization with the same membership as the EU—together represent half of the ECT membership. While this may give the EU some bargaining power in ECT renegotiations, amending the ECT requires unanimity,<sup>17</sup> and achieving it on investment and climate matters will be an uphill battle.

On investment, public reports about the closed-door renegotiation note that progress has been slow.<sup>18</sup> After the three rounds of talks held in 2020, a leaked progress report shows that negotiating partners are far from reaching unanimity on whether and how the investment protections of the ECT should be rewritten,<sup>19</sup> even though the European Commission has characterized them as “outdated.”<sup>20</sup> The existence of widely divergent views on reform of the ECT’s investment provisions<sup>21</sup>

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<sup>14</sup> Karl Mathiesen and Jakob Hanke Vela, “The Obscure Energy Pact that Threatens the EU’s Green Deal,” *Politico*, December 18, 2020, <https://www.politico.eu/article/energy-charter-treaty-threatens-eu-green-deal>.

<sup>15</sup> European Parliament, Amendments Adopted by the European Parliament on 8 October 2020 on the Proposal for a Regulation of the European Parliament and of the Council Establishing the Framework for Achieving Climate Neutrality and Amending Regulation (EU) 2018/1999 (European Climate Law), October 8, 2020, [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0253\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0253_EN.html).

<sup>16</sup> “Italy,” International Energy Charter (website), Energy Charter Secretariat, accessed February 12, 2021, <https://www.energycharter.org/who-we-are/members-observers/countries/italy>.

<sup>17</sup> Energy Charter Treaty, signed December 17, 1994, entered into force April 16, 1998, 2080 UNTS 95, Arts. 36(1)(a) and 42, <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>.

<sup>18</sup> Frédéric Simon, “Energy Charter Treaty Reform Reaches Milestone, with Little Progress to Show,” *Euractiv*, December 18, 2020, <https://www.euractiv.com/section/energy/news/energy-charter-treaty-reform-reaches-milestone-with-little-progress-to-show>.

<sup>19</sup> Energy Charter Secretariat, Report of the Modernisation Group on Progress Made in Fulfilling the Negotiations Mandate, November 25, 2020, [https://www.euractiv.com/wp-content/uploads/sites/2/2020/12/ECT-report-on-progress-made\\_FS.pdf](https://www.euractiv.com/wp-content/uploads/sites/2/2020/12/ECT-report-on-progress-made_FS.pdf).

<sup>20</sup> “Energy Charter Treaty Modernisation: European Commission Presents Draft Negotiating Directives,” European Commission (website), European Commission, May 14, 2019, <http://trade.ec.europa.eu/doclib/press/index.cfm?id=2017>.

<sup>21</sup> Lisa Bohmer, “Energy Charter Treaty Modernization Negotiations Reveal Fault Lines Regarding FET Standard, MFN Clause, and Right to Regulate,” *Investment Arbitration Reporter*, December 28, 2020,

illustrates the challenges of investment treaty negotiations generally, which are tough in a bilateral context and understandably even more so in a plurilateral context such as the ECT's.

On climate, the EU has proposed language purporting to safeguard States' right to regulate to combat climate change.<sup>22</sup> It has also proposed adding to the treaty's definition of "Energy Materials and Products" a timeline to phase out the protection of certain fossil fuel investments under the treaty by 2030 or 2040,<sup>23</sup> based on the EU's current climate ambitions. These proposals should be more ambitious, and would in any event need to be combined with amendments to other provisions. While they might then help minimize the threat that the ECT poses to a just low-carbon energy transition, the EU's challenge will be to bring on board its fossil fuel-dependent negotiating partners, which will likely not be eager or ready to agree to a phase-out of protections to fossil fuel investments.

A flexible approach could help accommodate different views from negotiating partners. The flexibility embedded in the Paris Agreement—each State's level of ambition is defined not in an internationally negotiated schedule of commitments, but in Nationally Determined Contributions (NDCs)—is behind its near-universal acceptance.<sup>24</sup> The model Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation,<sup>25</sup> the drafting of which I led, mirrors this approach. Under the model treaty, each State lists the investment sectors and activities that would benefit from treaty protection, and those that would be excluded from them. If it insists in renegotiation, the EU could convince other ECT Members to adopt such a flexible approach. The EU could commit to a phase-out of protections to fossil fuel investments from EU investors abroad and to fossil fuel investments by ECT Members in the EU—preferably much more swiftly than its proposed timeline—regardless of whether other negotiating partners do the same.

The fact that this is not a negotiation but a *renegotiation* gives defenders of the status quo a significant advantage over reform advocates: absent unanimity around change, the original text remains unchanged—investment provisions continue to be outdated and defective; fossil fuel investments continue to be protected. While some degree of give-and-take may still take place in the renegotiations, they are unlikely to result in bold reform of the ECT that would align it with EU law and policy on investment and climate. Instead, there is a high risk of lowest-common-denominator changes and even a stalemate—rounds and rounds of negotiations leading to meaningless change, or no change at all.

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<https://www.iareporter.com/articles/energy-charter-treaty-modernization-negotiations-reveal-fault-lines-regarding-fet-standard-mfn-clause-and-right-to-regulate>.

<sup>22</sup> "EU Text Proposal for the Modernisation of the Energy Charter Treaty (ECT)," European Commission (website), European Commission, May 2020, [https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc\\_158754.pdf](https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf).

<sup>23</sup> "EU Text Proposal for the Modernisation of the Energy Charter Treaty," European Commission (website), European Commission, January 25, 2021, [https://ec.europa.eu/energy/sites/default/files/eu\\_submission\\_-\\_revised\\_definition\\_of\\_economic\\_activity\\_in\\_the\\_energy\\_sector.pdf](https://ec.europa.eu/energy/sites/default/files/eu_submission_-_revised_definition_of_economic_activity_in_the_energy_sector.pdf).

<sup>24</sup> The Creative Disrupters, *Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation: Argumentation Demonstrating How the Model Treaty Meets the Assessment Criteria* (Stockholm: Stockholm Treaty Lab, July 2018), <https://stockholmtreatylab.org/wp-content/uploads/2018/07/The-Creative-Disrupters-Argumentation.pdf>.

<sup>25</sup> The Creative Disrupters, *Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation* (Stockholm: Stockholm Treaty Lab, July 2018), <https://stockholmtreatylab.org/wp-content/uploads/2018/07/Treaty-on-Sustainable-Investment-for-Climate-Change-Mitigation-and-Adaptation-1.pdf>.

## If meaningful reform fails, what could the EU still do?

Article 41 of the Vienna Convention on the Law of Treaties (VCLT) provides that, in given circumstances, “two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone.”<sup>26</sup> Accordingly, if the parties fail to achieve unanimity around meaningful reform, EU Member States—perhaps joined by like-minded ECT Members—should conclude an inter se agreement to modify the ECT as between themselves. For those States and investors from those States, the modifying inter se agreement could phase out the treaty’s protections to fossil fuel investments, adopt refined investment provisions, and even exclude the applicability of certain substantive protections and the ISDS clause. While they are at it, States could also agree on a legally binding international law commitment and timeline to swiftly phase out fossil fuel subsidies,<sup>27</sup> an element that is notably absent from the ECT but that should feature in any treaty on energy cooperation between States that claim to be climate champions.

One of the conditions for concluding an inter se agreement is that the modification it implements “does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations.”<sup>28</sup> Accordingly, EU Member States would only be allowed to modify elements of the ECT without affecting the rights of other ECT Members under the treaty. The unreformed ECT would continue to govern the relationship of EU Member States with investors from ECT Members that did not sign the inter se agreement. Investors from those other ECT Members could still initiate arbitration against EU Member States under the unreformed treaty, and EU investors could still launch ECT claims against their non-EU ECT host States. To prevent these possibilities, in combination with the inter se agreement, the EU should advance measures aimed at barring ECT arbitration, such as a withdrawal of advance consent to ISDS.<sup>29</sup>

Another condition is that the inter se agreement “does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.”<sup>30</sup> This provision represents a risk for EU Member States. A non-EU ECT Member sustaining the view that, for example, removing protections from fossil fuels under the inter se agreement would frustrate the achievement of the object and purpose of the ECT might want to strike down the inter se agreement through an inter-State arbitration against EU Member States under ECT Article 27.<sup>31</sup> It is difficult to ascertain the likelihood of such a move or its prospects of success—but it is a possibility.

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<sup>26</sup> Vienna Convention on the Law of Treaties, adopted May 22, 1969, entered into force January 27, 1980, 1155 UNTS 331, Art. 41, [https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch\\_XXIII\\_01.pdf](https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf).

<sup>27</sup> “Fossil Fuel Subsidies,” International Monetary Fund (website), International Monetary Fund, accessed February 12, 2021, <https://www.imf.org/en/Topics/climate-change/energy-subsidies#A%20Plan%20for%20Reform>.

<sup>28</sup> Vienna Convention on the Law of Treaties, Art. 41(b)(i).

<sup>29</sup> Lise Johnson, Lisa Sachs, Brooke Güven, and Jesse Coleman, “Clearing the Path: Withdrawal of Consent and Termination as Next Steps for Reforming International Investment Law,” *CCSI Policy Paper* (New York: CCSI, April 2018), <http://ccsi.columbia.edu/files/2018/04/IIA-CCSI-Policy-Paper-FINAL-April-2018.pdf>.

<sup>30</sup> Vienna Convention on the Law of Treaties, Art. 41(b)(ii).

<sup>31</sup> Energy Charter Treaty, Art. 27.

## Should the EU leave it?

In late 2020, a group of 280 Members of national Parliaments and of the European Parliament asked EU Member States to “explore pathways to jointly withdraw from the ECT.”<sup>32</sup> Soon thereafter, the French government requested the European Commission to study a “coordinated withdrawal” of the EU from the ECT,<sup>33</sup> given that it protects fossil fuels and slows down the EU’s 2050 carbon neutrality objective.

From the perspective of the Union, given that the stated reason for withdrawal is the inconsistency of the ECT with EU law and policy, any withdrawal should ideally be coordinated, with the entire bloc leaving the treaty.

However, if the Union fails to promote necessary coordination around its own laws and policies, unilateral withdrawal by EU Member States is a legitimate way for them to align their foreign investment policy with their climate change ambitions and commitments.

Withdrawal by individual EU Member States can have meaningful political consequences. Within the EU, it would continue to mount pressure for other Member States and the Union to reconsider and eventually withdraw too. Among remaining ECT Members, it could lead them to reassess the role and value of the treaty without the ex-Members, and potentially push remaining ones to meaningful reform of the treaty, withdrawal from it, or even its termination. Globally, it would likely weaken the attractiveness and certainly the political pressure of staying in the ECT or joining it.

Think, for example, of Nigeria. In the context of efforts by the ECT Secretariat to silently expand the ECT toward Africa, Asia, and Latin America and the Caribbean, persuading developing countries to join the outdated treaty, Nigeria started the process of accession to the ECT.<sup>34</sup> With the largest oil and gas reserves in Sub-Saharan Africa, Nigeria is struggling to move away from its petroleum addiction.<sup>35</sup> Nigerian political and economic elites in power have perhaps not yet realized that Africa’s future is not in oil, but in renewables,<sup>36</sup> and may be considering accession under the illusion that ECT membership would help the country to attract foreign investment—including from EU investors—in its petroleum sector. It would not.<sup>37</sup> Worse, upon Nigeria’s eventual accession to the ECT, foreign investors from ECT Members in Nigeria’s petroleum industry would benefit from old-generation

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<sup>32</sup> “Statement on the Modernisation of the Energy Charter Treaty,” Anna Cavazzini (website), Anna Cavazzini, November 3, 2020, <https://www.annacavazzini.eu/statement-on-the-modernisation-of-the-energy-charter-treaty>.

<sup>33</sup> Frédéric Simon, “France Puts EU Withdrawal from Energy Charter Treaty on the Table,” *Euractiv*, February 3, 2021, <https://www.euractiv.com/section/energy/news/france-puts-eu-withdrawal-from-energy-charter-treaty-on-the-table>.

<sup>34</sup> Pia Eberhardt and Cecilia Olivet, *Silent Expansion: Will the World’s Most Dangerous Investment Treaty Take the Global South Hostage?* (Brussels, Amsterdam, and Kampala: The Transnational Institute, Corporate Europe Observatory, and Southern and Eastern Africa Trade Information and Negotiations Institute, April 2020), [https://www.tni.org/files/publication-downloads/ect\\_silent\\_expansion.pdf](https://www.tni.org/files/publication-downloads/ect_silent_expansion.pdf).

<sup>35</sup> Perrine Toledano, Martin Dietrich Brauch, Tehtena Mebratu-Tsegaye, and Francisco Javier Pardinás Favela, *Equipping the Nigerian National Petroleum Corporation for the Low-Carbon Transition: How Are Other National Oil Companies Adapting?* (New York: CCSI, September 2020), <http://ccsi.columbia.edu/files/2020/09/CCSI-NNPC-Nigerian-National-Petroleum-Corporation-Low-Carbon-Transition-rev.pdf>.

<sup>36</sup> Manish Ram, Dmitrii Bogdanov, Arman Aghahosseini, Ashish Gulagi, Solomon A. Oyewo, Michael Child, Upeksha Caldera, Kristina Sadovskaia, Javier Farfan, Larissa S.N.S. Barbosa, Mahdi Fasihi, Siavash Khalili, Bernhard Dalheimer, Georg Gruber, Thure Traber, Felix De Caluwe, Hans-Josef Fell, and Christian Breyer, *Global Energy System Based On 100% Renewable Energy: Power, Heat, Transport and Desalination Sectors* (Lappeenranta and Berlin: LUT University and Energy Watch Group, April 2019), [http://energywatchgroup.org/wp-content/uploads/EWG\\_LUT\\_100RE\\_All\\_Sectors\\_Global\\_Report\\_2019.pdf](http://energywatchgroup.org/wp-content/uploads/EWG_LUT_100RE_All_Sectors_Global_Report_2019.pdf).

<sup>37</sup> Flues, Eberhardt, and Olivet, *Busting the Myths Around the Energy Charter Treaty*.

treaty protections tending to make the country's low-carbon transition difficult and expensive as a result of ISDS threats and cases. With big EU players withdrawing, ECT accession would become less attractive and more difficult for the Nigerian government to justify.

Withdrawal is permitted under ECT Article 47 and takes effect one year after the date of receipt of the withdrawal notification by the depositary of the treaty.<sup>38</sup> Energy investments made by EU investors in other ECT Members or by investors from ECT Members in the EU would no longer be protected by the ECT once the withdrawal takes effect. New investors would not have access to the ECT's ISDS mechanism to protect their post-withdrawal investments, significantly reducing the risk of ISDS cases against EU Member States.

However, under ECT Article 47(3)—the so-called sunset or survival clause—for 20 years from the effective date of EU Member States' withdrawal from the ECT, the treaty would continue to apply to existing EU investments in other ECT Members, and to existing investments made by other ECT Members' investors in the EU.<sup>39</sup>

The absurdity of the sunset clause cannot be stressed enough: for the two decades, a time that is crucial for the global energy transition and nearly overlaps with the EU's 2050 climate neutrality timeline, ECT Members would still be able to challenge and seek compensation for climate policies of the EU and its Member States, and existing EU investments abroad would still be able to challenge policies of non-EU ECT Members. In addition, if outstanding ECT Members reform the treaty after the EU's withdrawal, for better or worse, any amendments would not apply to EU Member States, since they would never have signed or ratified such amendments; withdrawal would therefore mean the survival, for the EU, of the unreformed treaty.

While withdrawing, EU Member States could attempt to negotiate out of the sunset clause but would be subjected to it unless all other ECT Members agree to relieve them from the application of the clause.

But the situation would be different between withdrawing EU Member States. In jointly withdrawing, they could conclude an inter se agreement under VCLT Art. 41 to neutralize the effect of the ECT's survival clause as between themselves.<sup>40</sup> The agreement would prohibit the initiation of ECT-based ISDS disputes initiated by an investor from an EU Member State against another EU Member State. Considering that these intra-EU disputes account for 80 of the 135 ECT-based cases initiated to date, the possibility of an EU withdrawal combined with an inter se agreement neutralizing the survival clause could substantially reduce the risks posed by ECT-based arbitration to climate action. If joined by non-EU withdrawing States, the agreement would have an even greater positive impact.

## Should the EU kill it?

Given the ECT's risks for and negative impacts on climate policy and public budgets, its unfitness for the purpose of attracting sustainable, climate-friendly foreign investment,<sup>41</sup> and its negative perception by civil society, the EU should work to bring its partners on board with the idea of

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<sup>38</sup> Energy Charter Treaty, Art. 41.

<sup>39</sup> Energy Charter Treaty, Art. 47(3).

<sup>40</sup> Vienna Convention on the Law of Treaties, Art. 41.

<sup>41</sup> Joachim Pohl, "Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence," *OECD Working Papers on International Investment 2018/01* (Paris: OECD Publishing, January 2018), [https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements\\_e5f85c3d-en](https://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en).

termination.<sup>42</sup> The EU’s current efforts to renegotiate the treaty—with low likelihood of a successful outcome—would be more valuable if employed to terminate it.

If, for example, Japan’s addiction to coal is what is fueling its opposition to climate-friendly reform of the ECT,<sup>43</sup> the EU could give its trade and investment negotiators a break and bring in energy policy experts to make the case against fossil fuel addiction. It makes not only environmental and climate sense to transition out of coal, oil, and gas, and to stop protecting them under international investment law, but also economic sense. The EU knows it,<sup>44</sup> and it would be in everyone’s interest for the EU to share it with ECT partners.

Absent a termination provision in the ECT, terminating it requires “consent of all the parties after consultation with the other contracting States.”<sup>45</sup> Since ultimately termination, like amendment, is not within the control of the EU, the Union’s next-best strategy would be to withdraw from the ECT and neutralize the survival clause through an inter se agreement, which non-EU withdrawing States should be welcome to join.

That said, the great advantage of termination would be for negotiating partners to start from a clean slate, asking first the fundamental question: how can international law help our countries to phase out fossil fuel investments, ramp up low-carbon energy investment, and promote a just transition, in line with the Paris Agreement and SDG 7.1 target to “ensure universal access to affordable, reliable, and modern energy services” by 2030?<sup>46</sup> The substantive provisions of the model Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation,<sup>47</sup> the idea of a Framework Convention on Investment and Sustainable Development,<sup>48</sup> and other academic insights here<sup>49</sup> and there<sup>50</sup> offer some answers. (Spoiler alert: old-generation investment protections, and mechanisms to settle disputes between foreign investors and host States, whether by international arbitration or adjudication, are not the answer.)

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<sup>42</sup> Tania Voon, “Modernizing the Energy Charter Treaty: What About Termination?,” *Investment Treaty News* 10, no. 4 (October 2019), <https://www.iisd.org/itn/2019/10/02/modernizing-the-energy-charter-treaty-what-about-termination-tania-voon>.

<sup>43</sup> Aaron Sheldrick, “Japan’s Climate Change Efforts Hindered by Biased Business Lobby: Study,” *Reuters*, August 5, 2020, <https://www.reuters.com/article/us-climate-change-japan-coal/japans-climate-change-efforts-hindered-by-biased-business-lobby-study-idUSKCN2511G4>.

<sup>44</sup> Dan Jørgensen and Andrea Meza Murillo, “We Have Set an End Date for Oil and Gas Production. The World Should Follow,” *Climate Home News*, December 12, 2020, <https://www.climatechangenews.com/2020/12/12/set-end-date-oil-gas-production-world-follow>.

<sup>45</sup> Vienna Convention on the Law of Treaties, Art. 54(b).

<sup>46</sup> “Goal 7,” Sustainable Development (website), United Nations Department of Economic and Social Affairs, accessed February 12, 2020, <https://sdgs.un.org/goals/goal7>.

<sup>47</sup> The Creative Disrupters, *Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation*.

<sup>48</sup> Matthew C. Porterfield, Lise Johnson, and Brooke Güven, *Reforming the International Investment Regime Through a Framework Convention on Investment and Sustainable Development* (Washington and New York: The Harrison Institute for Public Law at Georgetown University Law Center, CCSI, and Center for the Advancement of the Rule of Law in the Americas, October 6, 2020), [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a\\_framework\\_convention\\_on\\_investment.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/a_framework_convention_on_investment.pdf).

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<sup>50</sup> Lise Johnson, Lisa Sachs, and Nathan Lobel, “Aligning Investment Treaties with Sustainable Development,” *Columbia Journal of Transnational Law* 58, 58, <https://www.jtl.columbia.edu/journal-articles/aligning-international-investment-agreements-with-the-sustainable-development-goals>.